Nos. 11,943, 11,944, 11,946

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES W. AGNEW, JR., et al., *Appellants,* vs. AMERICAN PRESIDENT LINES, LTD., a corporation, *Appellee.*	No. 11,943	
JOHN W. GRIFFIN, et al., *Appellants,* vs. AMERICAN PRESIDENT LINES, LTD., a corporation, *Appellee.*	No. 11,944	CONSOLIDATED CASES
AUGUST FEDERER, et al., *Appellants,* vs. AMERICAN PRESIDENT LINES, LTD., a corporation, *Appellee.*	No. 11,946	

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

I.

STATEMENT OF THE CASE

The *S.S. President Harrison,* owned by the appellee, American President Lines, Ltd., opened shipping articles on October 15, 1941, covering a voyage from San Francisco westward to Manila

and other trans-Pacific ports. The vessel sailed from San Francisco on October 17, 1941, arrived at Manila, and sailed from Manila on December 3, 1941, to Chinwangtao, China, to evacuate United States Marines and civilians of American citizenship pursuant to the request of the United States Navy Department. On December 8, 1941, the *President Harrison* was overtaken and seized by the Japanese after grounding on Shaweishan Island, China. The crew members of the vessel were subsequently interned by the Japanese in and about Shanghai until on or about August 15, 1945, when the surrender of the Japanese brought about their liberation from internment.

The crew members were then repatriated to Pacific Coast ports of the United States and, upon their arrival, were paid wages by appellee for the entire period of their internment in addition to whatever wages and war bonus were still owing them at the time of the vessel's capture and their internment.

The eighty-five appellants in these three consolidated causes on appeal were all former crew members of the *President Harrison,* whose crew complement during the voyage in question consisted of one hundred and seventy-two members. The appellants were members, according to their ratings, of various maritime labor unions who had various collective bargaining agreements with the appellee and other Pacific Coast shipowners (589-591).* The collective bargaining agreements prescribing the wages, hours, and working conditions of such crew members are called "basic agreements." Since 1936, the Pacific American Shipowners Association (P.A.S.A.), of which appellee is a member, has negotiated these collective bargaining agreements with the various maritime labor unions involved. New basic agreements were negotiated between the P.A.S.A. and these maritime labor unions on various dates in October and November, 1941 (Bryan's Ex. 55, 56, 57, 58, and 59). All of the new basic agreements provided for a wage increase which

*Unless otherwise noted, all page references herein are to the Apostles on Appeal in case No. 11,943.

was termed an "emergency wage." The new basic agreements were entered into between October 31, 1941, and November 28, 1941 (Bryan's Ex. 55, 57, 58, and 59), except one, which was executed on October 1, 1941 (Bryan's Ex. 56). All the agreements, however, were, by their express terms, effective retroactively to October 1, 1941.

Accordingly, upon their repatriation to San Francisco, the appellees were paid wages for the period of their employment aboard the vessel before internment and for the period of their internment and repatriation at the increased rates provided by the new basic agreements, which were higher than those stated in the shipping articles (523-524; 530-532; Ex. 1). War bonuses paid to the appellants during their employment aboard the vessel prior to her capture were also computed on the basis of these increased wage rates prescribed by the new basic agreements (520-523).

In addition to basic agreements prescribing wages, hours, and working conditions for crew members employed aboard vessels operated by members of the P.A.S.A., the P.A.S.A. and the same various maritime labor unions negotiated and entered into other supplementary collective bargaining agreements covering the payment of war bonuses to crew members employed aboard vessels operated by members of the P.A.S.A. These agreements were commonly known as "supplementary bonus agreements." There were four series of such agreements. The first series were entered into between April 30 and July 5, 1940, after the outbreak of World War II in Europe (Bryan's Ex. 11, 12, 13, 14, and 15). The second series were all dated February 10, 1941 (Bryan's Ex. 17, 18, 19, 20, and 21), and the third series were all entered into on May 19, 1941 (Bryan's Ex. 22, 23, 24, 25, and 26). The first three series of these supplementary bonus agreements fixed the rates of war bonus payable to crew members and the conditions under which war bonus was payable. Between the third and fourth series of supplementary bonus agreements, to wit, on August 16, 1941, a special, nationwide

and uniform agreement relating to war bonus was entered into between unions representing licensed deck and engine room officers and representatives, including the P.A.S.A., of vessel operators on the Pacific, Atlantic, and Gulf Coasts (Bryan's Ex. 34).

The fourth series of supplementary bonus agreements, and the ones with which the issues in these appeals most directly are concerned, were entered into on various dates in October, 1941, as follows: Sailors Union of the Pacific (S.U.P.), October 9, 1941 (Bryan's Ex. 47); Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association (M.F.O.W.W.), October 9, 1941 (Bryan's Ex. 48); Marine Cooks & Stewards Association of the Pacific Coast (M.C.&S.), October 10, 1941 (Bryan's Ex. 50); National Organization of Masters, Mates and Pilots of America (M.M.&P.), October 20, 1941 (Bryan's Ex. 49)*; Marine Engineers Beneficial Association (M.E.B.A.), October 15, 1941 (Bryan's Ex. 51).

The fourth series of supplementary bonus agreements increased the rates of war bonus payable to crew members employed aboard vessels operated by members of the P.A.S.A. and also determined the conditions under which such war bonus was payable. In addition, however, and unlike the first, second, and third series of supplementary bonus agreements, the fourth series of these agreements contained a provision specifically covering the contingency of a vessel's being interned, destroyed, or abandoned as a result of war operations. This specific provision in the supplementary bonus agreements with the S.U.P., the M.F.O.W.W., and the M.C.&S. (Bryan's Ex. 47, 48, and 50) is identical, and reads as follows:

> "In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date the members of the crew

*The mimeographed copy of this agreement introduced as such exhibit erroneously shows the date as October 10, 1941.

arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein."

A similar, specific provision is contained in the supplementary bonus agreements with the M.M.&P. and the M.E.B.A. (Bryan's Ex. 49 and 51) and reads as follows:

"In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date that members of the crew arrive in Continental United States ports and the employees shall be repatriated to a Continental United States port.

"While employees are in the war zone areas described herein, war bonuses shall also be paid to them at the rate of 66⅔% of the said basic wages in Areas I to V inclusive, and 25% in Area VI."

Prior to the fourth series of supplementary bonus agreements, the appellee used a rider on shipping articles containing the following provision:

"In the event the vessel be interned and for that reason be unable to continue her voyage, the company agrees to pay wages including emergency wage increase, to the dates members of the crew arrive in a continental United States port; furthermore, the company agrees, in such event, to arrange for repatriation of such men to a continental United States port."

This form of rider was attached to the shipping articles of the *S.S. Perida,* which sailed on September 24, 1941 (Ex. D; 495), and the same form of rider was used by appellee on thirty-three other occasions in 1941 prior to October 3 (Ex. H; Appendix C). This form of rider was attached to the shipping articles of the *S.S. President Van Buren,* which were opened in New York on October 9, 1941, but the first of the fourth series

of supplementary bonus agreements executed in San Francisco that day was immediately reflected by the following clause added to the rider:

> "The agreement of October 9 between the Sailors Union of the Pacific and Pacific American Shipowners Association relative to war bonuses shall apply to this voyage."

After the supplementary bonus agreements of the fourth series containing the specific internment provision first quoted above were consummated, the form of rider employed on shipping articles by the appellee was changed to conform. The new form of rider was used by the appellee for voyages commencing after October 9, 1941 (Appendix D). The revised internment provision contained in the new form of rider applicable to unlicensed personnel, which form was attached to the shipping articles of the *President Harrison* on the voyage in question, reads as follows:

> "In the event the vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the Pacific American Shipowners Association and the Unions shown above shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rate specified in paragraphs 3 and 4 hereof shall be paid while employees are in the war zones defined herein."

The licensed personnel rider attached to the shipping articles of the *President Harrison* for the voyage in question contains the same provision except for reference to different bonus rates, as shown below:

> "In the event the vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the Pacific American Shipowners Association and the Unions

shown above shall be paid to the date the members of the crew arrive in a Continental United States port, and the employees shall be repatriated to a Continental United States port. War bonuses at the rate specified in paragraph 1, hereof, shall be paid while employees are in the war zones defined herein."

As admitted by the appellants and found by the District Court, the appellee paid to the respective appellants, following their repatriation, basic wages and emergency wages from December 8, 1941, the date of internment, to the respective dates the libelants arrived in a continental United States port. The amounts of these payments are set forth in the schedules attached to the answers of the appellee to the respective libels, and it was stipulated at the trial that these schedules accurately reflect the payments made to the appellants (No. 11,943, A. 28; No. 11,944, A. 26; No. 11,946, A. 132). These payments of wages and emergency wages for the entire period of internment varied according to the ratings of the appellants from amounts in excess of $3,800 to a maximum of $17,964.92. Other payments were made covering wages, emergency wages, and war bonuses for the period of employment aboard the vessel up to the date of the vessel's capture and the internment of the crew.

The appellants in these actions, in addition to the payments already made to them by appellee, are seeking the recovery of war bonus and an allowance for maintenance during the entire period of their internment on land. In respect to their claim for war bonus during the period of internment, the appellants contend that the shipping articles and riders attached thereto constitute the entire and only contract between the appellants and the appellee relating to the payment of war bonus and that the riders clearly provided for the payment of war bonus to the appellants during the period of their internment.

After hearing the testimony of witnesses and considering the evidence and written briefs of counsel, the District Court re-

jected these contentions of the appellants. The findings and conclusions of the District Court (586-600) may be summarized as follows:

The claim for war bonus during internment is dependent upon contract, but the contract consists not only of the shipping articles, with the attached riders, but also of the supplementary bonus agreements entered into with the various maritime labor unions in October, 1941. These supplementary bonus agreements, by their own express terms, were in effect at the time in question and were applicable to this voyage of the *President Harrison*. Furthermore, the riders attached to the shipping articles are ambiguous and uncertain in that, while they provided that war bonus "shall be paid while employees are in the war zones defined herein," there are no war zones defined therein as such, either geographically or otherwise. Resort to the supplementary bonus agreements is necessary to determine the real contractual intent of the parties, and such intent cannot and should not be determined from the riders alone. The supplementary bonus agreements are collective bargaining agreements and are implied parts of the shipping articles and the attached riders. The shipping articles and attached riders and the supplementary bonus agreements are related to the same matters, were entered into by and in behalf of the same parties at substantially the same time, and are parts of substantially one transaction, and must be taken and construed as parts of the same or a single transaction. The supplementary bonus agreements actually cover the subject of war bonus in greater detail and with more explicit and specific provisions than the riders attached to the shipping articles, and any inconsistency between the shipping articles, with the attached riders, and the supplementary bonus agreements must be controlled by the latter. The war risk zones or areas defined in the supplementary bonus agreements are fundamentally voyages and the zone, area, or voyage specifying what war bonus was payable to the appellants is restricted so as to include only that portion of the voyage

involved after crossing the 180th meridian westbound and recrossing the same meridian eastbound. The supplementary bonus agreements do not provide for the payment of war bonus to appellants during their internment on land. The appellants were paid war bonus for that portion of the voyage after the *President Harrison* crossed the 180th meridian westbound to December 8, 1941, and were paid basic wages and emergency wages during their internment from December 8, 1941, to the respective dates of their repatriation to a continental United States port as provided by the riders and the supplementary bonus agreements. The appellants are entitled to further war bonus payments only for the period of their repatriation voyage until crossing the 180th meridian eastbound. War bonus during that period of the repatriation voyage, computed at rates and in the manner prescribed by Decisions 2-C and 2-D of the Maritime War Emergency Board, was tendered in good faith by appellee to appellants, but this method of computation is erroneous. The articles with attached riders and the supplementary bonus agreements fix the rates of, and the manner of computing, war bonus during the repatriation voyage, and the appellants are entitled to recover war bonus so computed for that portion of their repatriation voyage before crossing the 180th meridian eastbound. The appellants are not entitled to recover maintenance during internment. There is no express or implied agreement obligating the appellee to pay maintenance while the appellants were interned.

As indicated in its written decision (561-582; 73 F. Supp. 944) the District Court, in reaching the foregoing conclusions, found support and precedent, particularly in construing the supplementary bonus agreements, in the decision by this court in *Steeves v. American Mail Line (The Capillo),* 154 F.(2d) 24. The District Court adopted the interpretation given by this court of these supplementary bonus agreements to the effect that war zones or areas are defined therein in terms of voyages and do not pertain to land areas and that the agreements do not pro-

vide for payment of war bonus during internment on land. The District Court also pointed out that *The Capillo* decision by this court differs from the present case in a respect which serves to emphasize the validity of the District Court's conclusion. In *The Capillo* decision, this court, as between the rider attached to the shipping articles and the supplementary bonus agreements, chose the rider as the document measuring the rights of the parties because of the specificity of its applicable provisions, which unequivocally obligated the shipowner to pay war bonus during the internment of the crew. No ambiguity in that rider required clarification. The *President Harrison* riders, however, so incompletely define "war zones" as to create the ambiguity which compels resort to the supplementary bonus agreements for clarification and for determination of what the parties meant by the contract they made.

II.

THE FINDINGS OF FACT BY THE DISTRICT COURT ARE PRESUMPTIVELY CORRECT

Before defining the issues or commencing our argument in support of the decision and final decree of the District Court, it is appropriate to appraise the manner in which this Court should approach the findings of fact by the District Court.

Although an appeal in admiralty opens the case for a trial *de novo,* findings of fact made by the District Court are entitled to the greatest weight. *Matson Nav. Co. v. Pope & Talbot,* 149 F.(2d) 295 (9 C.C.A.). This is especially true where they are based upon testimony given in open court, and their weight is modified if they are wholly based upon depositions. *Crist v. U. S. War Shipping Administration,* 163 F.(2d) 145, 146 (3 C.C.A.). If the findings are made both upon oral testimony and upon depositions submitted, they merit more consideration than if made after hearing of evidence by deposition alone, and an appellate court, in deciding they should not be disturbed unless contrary to the clear result of the evidence, is

restricted only by the dictates of its own judicial discretion. *United States v. Lubinski,* 153 F.(2d) 1013 (9 C.C.A.); *Tamashita Kisen K. K. v. McCormick Inter. S.S. Co.,* 20 F.(2d) 25 (9 C.C.A.).

The above principle was enunciated by this court as a "rebuttable prima facie presumption" that the findings of the District Court are correct and has consistently been followed. *Ernest H. Meyer,* 84 F.(2d) 496, 501 (9 C.C.A.). In those cases where all the evidence pertinent to the finding is given by deposition, there is a "lighter presumption in favor of the decision of the lower court." *Alioto v. Imahashi,* 115 F.(2d) 324 (9 C.C.A.). But where some of the evidence is by deposition and a substantial part is heard in open court, this court recognizes a "rebuttable presumption of correctness." *Tawada v. U. S.,* 162 F.(2d) 615, 617 (9 C.C.A.).

See also:

Thames v. Pac. S.S. Lines, Ltd., 84 F.(2d) 506 (9 C.C.A.);

The Pennsylvanian, 149 F.(2d) 478 (9 C.C.A.).

It has consistently been held that, when part of the testimony is received in court and part by deposition, the District Court "findings should not lightly be disregarded." *The Boston Maru,* 20 F.(2d) 508 (9 C.C.A.).

III.

THE ISSUES

In their brief, the appellants attack as error the consideration by the District Court of the supplementary bonus agreements for the purpose of determining the contractual intent of the parties in respect to the payment of war bonus in the event a vessel be interned, destroyed, or abandoned as a result of war operations and unable to continue her voyage. The appellants do not argue that the supplementary bonus agreements provide for the payment of war bonus during internment. They strive to persuade this court, as they did the District Court, that the

shipping articles and the riders attached thereto are the only documents that control the contractual relationship between the parties. They would have this court ignore and give no effect to these collective bargaining agreements, which, by their own express terms, were applicable and in effect. They contend that the riders attached to the shipping articles clearly provide for the payment of war bonus during all of the times that the appellants were west of the 180th meridian, including the period that they were no longer aboard the vessel and were interned on land.

While contending that the riders attached to the shipping articles, even when construed alone, do not provide for the payment of war bonus during the period of internment, the appellee contends that the collective bargaining agreements, consisting of the supplementary bonus agreements, also control the contractual rights and obligations of the appellants and appellee and that these agreements and the shipping articles with the riders attached must be construed together in determining the contractual intent of the parties.

The appellee further contends that, when these documents are taken together, they clearly do not provide for the payment of war bonus during the period of internment. Appellee's contentions, of course, accord with the conclusions reached by the District Court, and, as we shall later point out in more detail, this contended construction of the supplementary bonus agreements accords with *The Capillo* decision by this Court.

Accordingly, while the interpretation of the riders attached to the shipping articles, unaided by reference to any other document or evidence, is also an issue, the principal question involved in these consolidated appeals is whether the District Court was correct in considering and giving effect to the supplementary bonus agreements, which both this Court and the District Court have construed as not providing for the payment of war bonus during internment.

The right of the appellants to recover maintenance during their internment is a separate question and will be discussed independently following the discussion relating to the claim for war bonus during internment.

IV.

ARGUMENT

A. The Applicability of The Capillo Decision.

The appellants, in both opening briefs, embrace *The Capillo* decision by this court and assert that strong reliance is placed on the same to support a reversal of the final decree of the District Court. At the outset, we wish to make it clear that we embrace *The Capillo* decision by this court with equal affection and, we submit, with more legitimate right. We find in such decision, as did the District Court, clear support for its conclusions.

To what extent does *The Capillo* decision by this court serve as a precedent for deciding the issues involved in these consolidated appeals? We have heretofore quoted the specific provisions contained in the supplementary bonus agreements and in the riders attached to the articles of the *President Harrison* dealing with the eventuality of the internment, destruction, or abandonment of the vessel as a result of war operations. For convenience of reference and for the purpose of comparison, we set forth below the provision dealing with similar eventuality contained in the rider attached to the articles of the *Capillo:*

> "In the event the vessel *and/or crew be interned, imprisoned, hospitalized, or put ashore** due to war causes and for that reason, be unable to continue their voyage, the company agrees to pay wages *and bonus* to the date members of the crew arrive in an United States port, on the Pacific Coast; furthermore, the company agrees, in such event, to arrange for repatriation of such men to a United States port, on the Pacific Coast. Also, that the company be liable for any injuries suffered by any crew member due to war causes."

*Emphasis by italics supplied.

The rider just quoted differs in many material respects from the riders attached to the *President Harrison* articles. It will be noted that the *Capillo* rider refers not only to the internment of the vessel, but also to the internment, imprisonment, hospitalization, and putting ashore of the crew. It will also be noted that the rider specifically and expressly provides that, in such event, "the company agrees to pay wages *and bonus* to the date members of the crew arrive in an United States port." The term "bonus" is coupled with the term "wages." The joining of these two types of payment is the natural method of drafting such a provision if it be intended that war bonus as well as wages are payable to crew members during their internment. The payment of war bonus to the crew in the event of their internment as well as wages is related in no respect to war zones in the *Capillo* rider. The provision is specific that, if the crew is interned, they should be paid both wages and bonus until their arrival in a United States port. In the supplementary bonus agreements and in the riders attached to the *President Harrison* articles, the obligation to pay war bonus follows the provision obligating the shipowner to repatriate the crew to a continental United States port and is limited to the period when the crew members are in war zones.

This court, in *The Capillo* decision, stated that it was controlled by the elementary axiom that effect be given, if possible, to specific contractual language in preference to the same being held nugatory. To give effect to the specific agreement of the shipowner to pay the crew war bonus as well as wages in the event of their internment, this court ruled that the supplementary bonus agreements were inapplicable in that, to give effect to their clear, contrary provisions, the specific obligation to pay war bonus during internment would be rendered meaningless and of no effect.

As pointed out by the District Court in its written decision (570; 73 F. Supp. 949), there is nothing in the *President Harrison* riders or in any other evidence "to support even an in-

ference that the riders were actually intended to enlarge the scope of the war bonus guaranties contained in the applicable supplementary bonus agreements. At best, the language of the riders indicates an inartful attempt to incorporate the bonus provisions of the supplementary agreements into the articles. As a result, the so-called war zones were so incompletely defined as to create the ambiguity which in turn requires resort to the supplementary agreements for clarification." As already pointed out, the District Court found and concluded that the supplementary bonus agreements covered the subject of war bonus in greater detail and with more explicit and specific provisions than the riders attached to the shipping articles. There being no specific language providing for the payment of war bonus during internment, the *President Harrison* riders present no problem as existed in *The Capillo* case about giving effect to such specific provisions in preference to the same being held nugatory. In fact, the same axiom may be invoked in the opposite direction in the present case to give effect to the specific language contained in the supplementary bonus agreements rather than render the same meaningless. Having reached the conclusion that the supplementary bonus agreements must be given effect according to their express provisions, the District Court found no difficulty in reaching the conclusion that these collective bargaining agreements do not provide for war bonus during internment on land. The same conclusion was reached by this court in *The Capillo* decision, where the supplementary bonus agreement with the Pacific Coast Marine Firemen, Oilers, Wipers & Watertenders Association of October 9, 1941 (Bryan's Ex. 48) and the supplementary bonus agreement of October 10, 1941 with the Marine Cooks and Stewards Association of the Pacific Coast (Bryan's Ex. 50) were considered. In construing these supplementary bonus agreements and comparing their provisions with those contained in the *Capillo* rider, this court ruled as follows (154 F.(2d) 24 at 25):

> "Since, if rational, we must construe the second paragraph to give effect to its agreements, we construe the pro-

vision of the union agreement for period of bonus during the return voyage of the ship to the 180th meridian as not 'applicable' to the specific agreement to pay one during the period of captivity after the ship's destruction in Manila.

"The same is true of the cooks and stewards union agreement. There, the war bonus period is during the ship's voyage westerly from and easterly to the 180th meridian. It is not applicable to a case of the destruction of the vessel and the subsequent period of captivity and repatriation specifically provided for in the second paragraph of the rider.

"It was thought that there was some ambiguity in the provisions of these instruments which warranted testimony as to their meaning. We do not agree. It requires no testimony to make it clear that the union agreements did not provide for the bonus during the period specifically provided in the shipping articles."

Having in mind the conclusions reached by this court in *The Capillo* case and the effect given this decision by the District Court in the present case, we may now proceed to discuss in more detail the many reasons that compel the supplementary bonus agreements to be considered with the riders attached to the *President Harrison* shipping articles and that support the final conclusion that neither such riders nor such supplementary bonus agreements provide for the payment of war bonus during internment.

B. The Supplementary Bonus Agreements Were Effective and Applicable by Their Own Express Terms.

The libels and contentions of appellants are predicated upon the proposition that the shipping articles and the attached riders constitute the sole contract between the appellants and the appellee. Appellants do not attempt to explain how or why collective bargaining agreements between the parties, which, by their own express terms, were applicable and in effect, can be

peremptorily dismissed and ignored. A cursory examination of these supplementary bonus agreements entered into in October, 1941, discloses that, by their own express provisions, the same were made automatically effective and applicable to all voyages, shipping articles for which were entered into on or after August 16, 1941 (Section 6 of Bryan's Ex. 47, 48, and 50; Section 1 of Bryan's Ex. 49 and 51). Since the shipping articles of the *President Harrison* were entered into on October 15, 1941, the supplementary bonus agreements, by their specific terms, applied to this voyage.

Being in effect, operative, and applicable by their own express provisions, these collective bargaining agreements must be construed as valid, enforceable, and binding upon the parties. A collective bargaining agreement has been described as "an accord as to the terms which will govern hiring and work and pay," and after a collective bargaining agreement has been consummated, "there is little left to individual agreement except the act of hiring." *J. I. Case Co. v. N.L.R.B.,* 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762. Although the original concepts of the nature of collective bargaining agreements gave them limited effect, "gradually, however, courts have come to the position that the collective bargaining agreement gives rise to valid, enforceable obligations, binding both the employer and the employee." *Annotation,* 88 L.Ed. 773; *Christiansen v. Local 680 of M.D.&D. Employees,* 126 N.J.Eq. 508, 10 A.(2d) 168.

C. The Riders Attached to the Shipping Articles Are Ambiguous and Resort to the Supplementary Bonus Agreements Is Proper and Necessary for Clarification and to Ascertain the Contractual Intent of the Parties.

The District Court found that the "riders attached to the shipping articles are ambiguous and uncertain in that, while they provide that war bonus 'shall be paid while employees are in the war zones defined herein,' there are no war zones defined therein as such, either geographically or otherwise" (592). The

District Court further found that "Resort must be made to the supplementary bonus agreements in order to determine the real contractual intent of the parties in respect to the claim of the libelants for war bonus during their internment from December 8, 1941, to their repatriation to and arrival at a continental United States port" and that "Such intent cannot and should not be determined from the riders alone" (592-593).

One obvious ambiguity that appears in the riders attached to the shipping articles arises from the use of the term "emergency wage increase." This term is used in paragraph 1 of the riders for both the licensed and the unlicensed personnel, and also in paragraph 3 of the rider for licensed personnel and in paragraph 5 of the rider for unlicensed personnel. However, it was stipulated at the trial that the term "emergency wage increase," as used in these particular provisions of the riders, meant "war bonus" (588-589). The riders for the licensed and the unlicensed personnel, using the stipulated term "war bonus" in substitution for the term "emergency wage increase" are set forth in Appendix A and Appendix B attached hereto. The term "emergency wage increase" used in the respects noted is not to be confused with the term "emergency wages" used in paragraph 4 of the rider for the licensed personnel and in paragraph 6 of the rider for unlicensed personnel. All counsel agreed that the term "emergency wage" used in the internment provisions of the riders did not mean war bonus (513). The term "emergency wage" describes what, in essence, amounted to an increase in the basic wages paid to the crew members. This increase also was prescribed by the basic agreements (505-506).

The most significant ambiguity appears in the second sentence of paragraph 4 of the rider for licensed personnel and the second sentence of paragraph 6 of the rider for unlicensed personnel. These two provisions state that "war bonuses shall be paid while employees are in the war zones defined herein." The District Court found as we contend, that no definition of war zones is contained in the riders.

Appellants contend that the term "war zones," as used in the provisions of the riders just quoted, is defined in the paragraph in each rider which reads as follows:

> "This emergency wage increase [i.e., war bonus] to apply from the crossing of the 180th meridian westbound until crossing the 180th meridian eastbound."

As stated by the District Court in its written decision (73 F.Supp. 947), "There is no other language in the rider which by any stretch of the imagination could supply the missing definition of 'war zones.' "

In the supplementary bonus agreements with the unions representing unlicensed personnel (Bryan's Ex. 47, 48, and 50), the following definition of war zones is set forth:

> "1. The following war bonus rules shall govern the parties hereto—
>
> a) There shall be five war risk zones; namely:
>
> * * * * * * *
>
> III. Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (After crossing the 180th Meridian westbound, until recrossing the same Meridian eastbound.)"

A similar definition is contained in the supplementary bonus agreements with the unions representing licensed personnel (Bryan's Ex. 49 and 51) as follows:

> "(2.) War risk areas wherein war risk bonuses shall be paid licensed officers are set forth as follows:
>
> * * * * * * *
>
> Area IV. Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula.
>
> * * * * * * *
>
> "Subject to terms and conditions following, war bonuses shall be paid in the respective areas as above defined, as follows:
>
> Area IV. 66⅔% of basic wages from the crossing of the 180th meridian, westbound, until recrossing the same meridian eastbound."

The identical provision contained in paragraph 3 of the rider for licensed personnel and paragraph 5 of the rider for unlicensed personnel, which appellants contend constitutes a definition of the term "war zones," coincides with the provisions of the new supplementary bonus agreements just quoted delimiting the portion of such trans-Pacific voyage during which war bonus is payable. These provisions are not definitions of war zones. The war zone is the trans-Pacific voyage specified in the supplementary bonus agreements, and these provisions are words of restriction confining the war zone voyage to that portion west of the 180th meridian.

The District Court, in the light of these circumstances, most assuredly was justified in concluding that the riders did not contain a definition of war zones and that "At best, the language of the riders indicates an inartful attempt to incorporate the bonus provisions of the supplementary agreements into the articles" (570; 73 F.Supp. 949). There can be no doubt also that, with such incompleteness and ambiguity in the riders, the District Court was further justified in admitting and considering extrinsic evidence consisting, among other things, of the supplementary bonus agreements to supply the incomplete or missing war zone definition. In this connection, it should be remembered that the internment clause of the riders was revised to conform to the internment clause contained in the supplementary bonus agreements entered into only a few days previously. This revision introduced into the riders for the first time the provision for paying war bonus while employees were in war zones following the provision obligating the shipowner to repatriate the crew (see Appendix C and Appendix D). With the riders thus revised being silent, incomplete, or ambiguous in respect to a definition of the war zones, can the right to consider the so recent genesis of the term "war zones" be seriously doubted?

The case of the *S.S. India Arrow,* 116 F.(2d) 8 (5 C.C.A.) is remarkably similar to the present case. There, a libel was filed by the crews of two vessels seeking the recovery of a bonus for

each seaman under contracts to pay such bonus if the ship should call at Spanish ports. The sole question was whether Santa Cruz de Tenerife, in the islands off the west coast of Africa, was a Spanish port within the meaning on the contracts. The similarity of this case to the present one and the pertinency of the court's rulings warrant quotation from the decision at some length.

> "The answers conceded that the port of Santa Cruz de Tenerife was in a general sense a Spanish port, but contended that it was not as the term was used in the contracts, and that the expression was ambiguous and explainable; or if not it prayed to reform the contracts to express the mutual intent more clearly. The district judge thought the contracts clear and apparently rejected from consideration the evidence touching their genesis. In our opinion 'Spanish ports' may mean either ports in Spain, or ports belonging to Spain. The evidence shows, as we judicially know, that the Canary Islands are hundreds of miles away from Spain, so that their ports are not in Spain and not Spanish ports in a geographical sense; but the Canary Islands are administratively a part of Spain, so that ports there are Spanish ports from a political standpoint. 'Spanish river', or 'Spanish mountain', would mean a river or mountain in Spain, but the expression Spanish port is fairly ambiguous. It is therefore proper to consider evidence of the circumstances and the intentions of the parties in their use of it.
>
> "The evidence shows without conflict that during the Spanish Civil War, on September 23, 1937, the United States Maritime Commission agreed to pay a cash bonus of $50 on government operated vessels which entered danger zones in Chinese and Spanish waters, and if vessels were interned to pay wages during such delay, defining the Spanish waters meant as 'Territorial waters of Spain, Spanish Morocco and the Balearic Islands, including waters between the Balearic Islands and the Spanish mainland.' On September 29, 1937, the Export Steamship Corporation and the National Maritime Union, by M. Byne (it being the union of which libellants are members), made a contract for a ship of that corporation, providing a $5 per month increase in pay and a $50 bonus, and wages during intern-

ment, but the bonus was to be paid only if the ship should 'go into ports of Spain * * * until such time as the U. S. Maritime Commission cancels similar basis applicable to government operated ships which might call at Spanish ports.' On October 7, 1937, appellant was about to sail a vessel into the Mediterranean Sea, and its representative, Capt. Fiske, at New York, conferred with Howard McKenzie acting for the National Maritime Union, called his attention to the action of the Maritime Commission, and exhibited a copy of the contract between the Union and the Export Steamship Corporation, and asked if it was satisfactory to be used with the vessels of appellant, and he agreed. Fiske then dictated a contract which he thought was the same as the Export contract, but it used as to the bonus the words 'should call at Spanish ports' instead of 'going into ports of Spain.' The wording was identical otherwise. Fiske executed it for appellant and McKenzie for the Union. Without any further discussion exactly similar contracts were later executed for seven other vessels of appellant, including the two here involved. None of these vessels was intending to go to the Canary Islands and those Islands were not discussed or considered in framing any of the contracts. On March 11, 1938, one of appellant's ships was about to sail from Boston to Santa Cruz de Tenerife, and a contract in the above form was tendered the crew, but they refused to sign on unless a bonus was provided for. Fiske conferred with the Union, speaking with M. Byne, who seems to be the same who signed the original Export Steamship Corporation agreement, and they agreed that the bonus contract did not include Tenerife, and that the crew should sign on without a bonus for going there, and this was done. The contracts before us were signed about two months later, on June 5 and June 17, with no notice to Fiske of any change of view or contention on the part of the Union. But libellants proved by a representative of the Union at New Orleans that on March 22, 1938, a union contract was signed in Texas with the American-West African Line for one of its vessels, providing a bonus of $50 if in the port of Tenerife, or 100 miles thereof, the ship should be attacked by airplane, armed trawler, or man of war. Fiske testifies without contradiction that the con-

tracts he made were understood to refer only to the Spanish ports in the danger zone pointed out by the Maritime Commission, and had no reference to remote islands or possessions of Spain.

"Since the American-West African contract was with another party and was altogether different in wording from those before us, and was not known to Fiske when these were made, nor considered in making them, it can throw no light on them. Yet the contracts in controversy do not stand independent and alone, but are mere repetitions as to these two ships of the original agreement made between appellant and the Union on October 7, 1937. The same form was used, with no further discussion of the terms. There is a direct reference in the contracts to the action of the Maritime Commission as to 'Spanish ports,' which shows the parties intended their contract to have the same substantial scope as the action of the Commission. The practical interpretation of the contract in the case of the ship sailing from Boston to the Canary Islands on March 11, 1938, is a powerful evidence that neither side thought the Islands included. Fiske's testimony to that effect is wholly uncontradicted.

"With the intent of the Union thus established, the seamen whom it represented cannot claim a different intent. The Union and not they signed these contracts. The Union was their representative, and the contracts mean what their representative and the opposite party understood them to mean.

"The judgment is set aside in each case and one will be entered dismissing the libel at libellants' cost."

It will be noted that, in the case cited, the term "Spanish ports" was termed fairly ambiguous in that it was not known whether the parties meant ports in Spain or ports belonging to Spain. In the *President Harrison* riders, the term "war zones" is fairly ambiguous or incomplete in that no war zones, as such, are defined in the riders. In the cited case, evidence of the genesis of the term in question was considered and was admitted showing that the provision was adopted from a Maritime Commission contract which provided for payment of the bonus only

in ports of Spain. In the present case, evidence of the genesis of the term "war zones" was introduced showing that the provision was adopted from the supplementary bonus agreements, which provided for payment of war bonus in war zones or areas specifically described in terms of voyages. In the cited case, the ambiguity was resolved by reference to the genesis of the contract, and the bonus was held not payable for calls at ports belonging to Spain. In the present case, the ambiguity or incompleteness of the riders was resolved by reference to the genesis of the contract, and it was held by the District Court that war bonus was not payable while crew members were on land and not aboard a vessel on a voyage prescribed as a war zone or area.

D. Shipping Articles Have No Greater Sanctity Than Other Contracts in Determining Contractual Intent.

The appellants endeavor to persuade this court, as they endeavored to persuade the District Court, that shipping articles possess a certain sanctity and immunity not found in other contracts which prohibit reference to extrinsic evidence to ascertain the contractual intent of the parties despite the fact that shipping articles or attached riders are incomplete and ambiguous. In its written decision, the District Court answered such arguments of the appellants as follows (566-568; 73 F.Supp. 948):

> "In reality, however, the substance of libelants' argument is that the court is bound to blindfold its judicial eye to any relevant matters which might clear up a patent ambiguity to the seamen's disadvantage, merely because of the liberal doctrines which have been applied in dealings between shipowner and seamen for the latter's protection. But to deny a litigant the right to explain actual mutual intent in the use of ambiguous or uncertain terms, solely to preserve such ambiguity or uncertainty for the legal advantage to be thereby derived to his adversary, is beyond the bounds of all judicial liberality.
>
> "Furthermore, such a theory violates the spirit of fairness which must dominate the practical application of abstract

legal concepts in a judicial system bent upon an impartial administration of law.

"Section 676 of Title 46 USCA does no more than reaffirm the familiar parol evidence rule that the plain terms of a contract may not be changed by recourse to extrinsic evidence. Certainly it does not vary the fundamental principle that ambiguity and uncertainty in language may be extrinsically clarified. True it is that the admiralty, in its jealous regard for the protection of the contractual rights of the lesser privileged seaman, requires shipping articles to make clear the essential terms of the contract of hire. Rules of admiralty law of this nature spring from the days when the seaman stood alone and when his need for legal protection in arriving at a fair contract of hire was very great. Consequently, in the national interest as well as in the seaman's own private interest, exceptional legal safeguards have protected the seaman against encroachment upon his human rights at the hands of the more favorably situated shipowning employer. However, the legal protection so established arose from and was based upon need. In good reason, the legal right thereto should be commensurate with and limited to such need. Today in the employer-employee relationship the position of the workman, and seaman as well, has become more fully equalized by force of his legally guaranteed right of collective bargaining.

"When the President Harrison articles were opened, supplementary bonus agreements, collectively arrived at, were effective. They were binding upon libelants as well as respondent and resulted from negotiations in which the seamen were adequately represented and their rights vigorously safeguarded. Their terms cannot be ignored or rejected, merely because of the possibility that they might, in a manner adverse to libelants, supply the explanation to uncertain language in the articles.

"Decision in this case might well rest upon an interpretation of the riders themselves to the effect that 'war zones' in the riders referred to and characterized only the designated areas as and when traversed by the President Harrison. But the court is of the view that justice requires consideration of the full picture of the contractual relations of

> the parties. Consequently I hold that the supplementary bonus agreements are properly in evidence as part of the contract of hire governing the voyage of the President Harrison, to explain the uncertainties in the riders' terms."

Understandingly, counsel cite no authorities for the unsound proposition they advance. They refer to federal statutes (e.g., 46 *U.S.C.A.* 564) that provide for the execution of shipping articles and what shall be contained therein. With little more, they then arrive at the conclusion that the shipping articles and attached riders necessarily constitute the entire and only contract between the crew members and the shipowner and that even if ambiguity exists in the same, no resort may be made to extraneous sources for clarification. Such federal statutes define only the minimum terms and conditions to be contained in shipping articles. Not even an inference can be drawn from such statutes that crew members and their shipowning employers are restricted to the shipping articles in defining the contractual relationship between them. Most certainly, there is no judicial support for the contention that extrinsic evidence may not be considered to resolve an ambiguity in the shipping articles. On the other hand, there is recent legal precedent directly to the contrary in a case involving similar claim by seamen for war bonus during internment.

> "And as in the interpretation of any other contract where there is ambiguity, extraneous evidence is admissible to aid in the construction of ships articles."
>
> *Mason v. Texas Co.,* 76 F.Supp. 318 at 321 (D.C. Mass. 1948).

Furthermore, we submit, it is a matter of such common knowledge that this court may take judicial notice of the fact that rights and obligations respecting the employment of crew members by vessel owners on the Pacific Coast are governed by the terms and conditions of collective bargaining agreements negotiated by their respective representatives as implied parts of their individual contracts of hire represented by the shipping articles, irrespective of ambiguity in the latter documents. As these words

are written, a settlement has just been reached of a prolonged maritime strike concerning the terms and conditions of collective bargaining agreements governing the employment, among others, of crew members by Pacific Coast shipowners. We know it would be a shock to all seafaring personnel returning to their jobs, as well as to their shipowning employers and the many other persons and business concerns affected by the strike, to hear it asserted that the newly consummated collective bargaining agreements are not valid, enforceable contracts and do not contractually govern, according to their terms, the conditions of employment of such employees. It is difficult to conceive of anything that could be more disruptive of the much needed and long sought stability in maritime labor relations than the establishment of such a principle. The various collective bargaining agreements in evidence in the present case demonstrate on their face that the parties intend such contracts to control terms of employment of the crew aboard vessels in conjunction with shipping articles.

In the case of *Clayton, et al., v. Standard Oil Co. of N. J.*, 42 F.Supp. 734, 1942 A.M.C. 61 (S.D. Tex.), the libelant crew members sought recovery of one-half of their wages, which was withheld by the respondent on the ground the libelants were deserters. The libelants contended the collective bargaining agreement between the National Maritime Union, of which they were members, and the respondent was a part of the shipping articles, and, since that agreement expired during the voyage from Boston to Galveston, they were justified in leaving the ship at the latter port. The court held in part as follows, at page 736:

> "There is nothing in the shipping articles which refers to the agreement, but I think that, taking the record as a whole, it appears, and I find, that it is intended to make the agreement a part of the shipping articles."

In holding that the libelants had no lawful right to leave the vessel and were deserters, and in ruling that there was no provision in the collective bargaining agreement which permitted

the libelants to leave the vessel as they did, the court, at page 743, ruled as follows:

> "The shipping articles between libelants and respondent and the agreement between the National Maritime Union and respondent, construed together, must be regarded as the contract between libelants and respondent."

We sincerely submit, as a matter of sound legal principle, that, whether there is ambiguity or uncertainty in shipping articles or not, the contractual relationship between crew members and shipowners and the terms and conditions of employment of the former by the latter are set forth in both the shipping articles and applicable collective bargaining agreements construed together. There is ample evidence in the record of this case to substantiate this proposition both as a sound legal principle and as an established practice.

By their own actions in this proceeding, the parties have acknowledged that collective bargaining agreements are not only implied parts of shipping articles, but are controlling in case of inconsistency. The monthly rates of pay set forth in the shipping articles (Ex. 1) under the title "Wages per Month" were not the basis upon which basic wages and emergency wage increases were paid to the appellants or other crew members, either for the period of employment aboard the vessel up to December 8, 1941, or for the period commencing with their internment on the latter date and ending with the return of the men to a continental United States port. Similarly, war bonus for the time the vessel was in the prescribed war zone prior to internment on December 8, 1941, was not computed or paid upon basic wages set forth in the basic wage agreements referred to in the two riders. The one exception to these statements is in the case of the unlicensed engineroom personnel inasmuch as the new basic agreement with the M.F.O.W.W. was executed on October 1, 1941, before the shipping articles were opened, and was the agreement specified in the rider for unlicensed personnel.

As shown by the undisputed testimony of Mr. Robert D.

Wade, vessel payroll auditor of the appellee, basic wages and emergency wage increases, except in respect to unlicensed engine-room personnel, were computed and paid at increased rates fixed by basic agreements negotiated and executed after the shipping articles were opened on October 15, 1941. War bonus payable up to December 8, 1941, was also computed at the increased basic wage rates fixed by the new basic agreements (520-525).

In its answers to the various libels, the appellee incorporated attached schedules showing the rates and amounts of basic wages, emergency wage increases, and war bonus (prior to December 8, 1941) paid to the appellants. Counsel for the appellants stipulated that these schedules were correct and accurately reflected the payments to the appellants (526-528). The "Wages per Month" shown on the shipping articles (Ex. 1) included basic wages and emergency wage increases (530-532). Comparison of these rates set forth in the shipping articles with the rates set forth in the aforementioned schedules also demonstrates that the wages and emergency wage increases prescribed by the new basic agreements and paid to the appellants were at higher rates than those specified in the shipping articles.

The obvious significance of this evidence is that the parties in this case followed without question the legal principle and the long-established practice of recognizing collective bargaining agreements as defining the contractual relationship between crew members and their shipowning employers. In fact, by making and accepting the payments of basic wages, emergency wages, and war bonuses at the higher rates prescribed in the collective bargaining agreements, the parties also recognized such agreements as being paramount and controlling where inconsistent with the riders.

Of similar significance is the fact that, in the case of the appellants who were licensed officers of the *President Harrison,* war bonus for the period prior to December 8, 1941, was computed, paid, and accepted at rates prescribed by the fourth series of supplementary bonus agreements with the M.M.&P. and the

M.E.B.A., which were higher than the rates specified in the licensed personnel rider. It will be noted in the licensed personnel rider that war bonus for licensed officers was computed at 60% of their basic wages set forth in the basic agreements specifically described in the rider. The supplementary bonus agreements with the M.M.&P. (Bryan's Ex. 49) and the M.E.B.A. (Bryan's Ex. 51) prescribed war bonus at the rate of 66⅔% of basic wages. Mr. Wade testified the licensed officers were paid war bonus for the period up to December 8, 1941, at the increased rate of 66⅔% instead of the 60% rate set forth in the licensed personnel rider (523). Furthermore, the 66⅔% was computed on the increased basic wage fixed by the new basic agreements supplanting those prescribed in the rider.

At the time the shipping articles were opened on October 15, 1941, supplementary bonus agreements with the M.M.&P. and the M.E.B.A. had not been signed. Hence, the old and lower rates fixed by the August 16, 1941, agreement (Bryan's Ex. 33) were in effect and were the rates stated. The new supplementary bonus agreements with these unions, however, were retroactive to October 1, 1941, and were accepted and put into effect by the parties in accordance with law and practice as paramount to the shipping articles and attached riders.

The appellee does not contend that the acceptance of basic wages, emergency wages, and war bonus computed at these increased rates constitutes a waiver by appellants of their claim for war bonus during internment. Following the repatriation of the appellants and other crew members, a form of release (Ex. I) was agreed upon so as to permit the appellants and other crew members to receive the payments admittedly due them by appellee but still preserve their right to seek the recovery of war bonus during internment by judicial action such as here involved (Ex. I; Ex. 9; 553). Appellee does contend, however, that the making and accepting of these payments constitutes a practical and natural recognition by the parties in this case that collective bargaining agreements define the contractual relation-

ship of the parties together with the shipping articles and attached riders. Counsel for appellee did not stipulate that the releases aforementioned precluded the appellee from making this contention but in fact specifically reserved the right to assert the same (377-378).

E. The Supplementary Bonus Agreements and the Riders Attached to the Shipping Articles Were Part of the Same Transaction and Must Be Taken Together as a Matter of Construction.

The District Court found and concluded (595, 599) that:

> "The shipping articles, with the riders attached thereto, and the supplementary bonus agreements were writings and contracts relating to the same matters and entered into by and in behalf of the same parties at substantially the same time and are parts of substantially one transaction. The shipping articles with the riders attached thereto and the supplementary bonus agreements must be taken as parts of the same or a single transaction."

The rule of construction embodied in the above-quoted finding and conclusion of the District Court and its application to the facts of this case furnishes another, independent reason and basis for the supplementary bonus agreements to be considered and construed together with the riders attached to the shipping articles. It is a well established rule of construction, as set forth in Sec. 1642 of the California Civil Code, that "several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."

The United States Supreme Court has held that "several writings executed between the same parties substantially at the same time and relating to the same subject-matter may be read together as forming parts of one transaction, nor is it necessary that the instruments should in terms refer to each other." *Bailey v. Hannibal & St. J. R.R. Co.,* 17 Wall. 96, 84 U.S. 96, 21 L.Ed. 611.

The supplementary bonus agreements were executed with the S.U.P. and the M.F.O.W.W. on October 9, 1941, with the M.C.&S. on October 10, 1941, with the M.E.B.A. on October 15, 1941, and with the M.M.&P. on October 20, 1941. The shipping articles of the *President Harrison* with the riders attached were opened on October 15, 1941. Clearly, the supplementary bonus agreements and the shipping articles with the attached riders were executed at substantially the same time.

The supplementary bonus agreements were entered into by the unions in behalf of their respective members. The appellants were admittedly members of such respective unions and represented by them for collective bargaining purposes. These supplementary bonus agreements were entered into by the P.A.S.A. in behalf of its members, including the appellee (196-198; Bryan's Ex. 1 and 1A). The shipping articles with the attached riders were entered into by the appellants and by the Master of the vessel in behalf of the appellee (Ex. 1). It is equally clear, therefore, that the supplementary bonus agreements and the shipping articles with the riders attached were contracts between the same parties.

The riders and the supplementary bonus agreements obviously relate to the same subject matter, to wit, the payment of war bonus, including the rates thereof, the circumstances under which the same are payable and, particularly, the rights and obligations of the parties in the event the vessel be interned, destroyed, or abandoned as a result of war operations and unable to continue her voyage.

Under these indisputable circumstances, this well established rule of construction requires the supplementary bonus agreements and the riders to be taken and read together as parts of the same or a single transaction.

F. The Supplementary Bonus Agreements, as a Matter of Substantive Law, Prescribed Terms and Conditions That Were Implied Parts of the Shipping Articles and Could Not Be Varied by Individual Contracts of Hire.

The District Court found that the supplementary bonus agreements were collective bargaining agreements arrived at following negotiations between the collective bargaining representatives of the appellants and the appellee (591-592, 593). The District Court also found and concluded that the supplementary bonus agreements were implied parts of the shipping articles and the riders attached thereto and that any inconsistency between the two is controlled by the collective bargaining agreements (595, 599).

The United States Supreme Court has likened the collective bargaining agreement "to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for services, which do not themselves establish any relationship, but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established." *J. I. Case Co. v. N. L. R. B.,* 321 U.S. 332 at 335, 64 S.Ct. 576, 88 L.Ed. 762 at 766.

The relationship between a collective bargaining agreement and an individual contract of hire has been said to somewhat resemble "that between a group insurance policy and the individual insurance certificates issued under it." *Christiansen v. Local 680 of M. D. & D. Employees,* supra. "After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings." *J. I. Case Co. v. N. L. R. B.,* supra, at U.S. 335, L.Ed. 766.

The following principle enunciated by the court in *Christiansen v. Local 680 of M. D. & D. Employees,* supra, has been frequently quoted and also appears in the annotation in 88 L.Ed. 770 at 773:

> "The contract between employer and union not only enters into the individual contracts, but it circumscribes

> the rights of the employer and the members of the union with respect to making individual contracts of employment."

The principle just mentioned was quoted with approval in *Dooley v. Lehigh Valley R. Co. of Pa.,* 130 N.J.Eq. 75, 21 A.(2d) 334. The opinion in the last cited case was adopted on appeal and affirmed in 131 N.J.Eq. 468, 25 A.(2d) 893, and the United States Supreme Court denied certiorari in 317 U.S. 649, 63 S.Ct. 45, 87 L.Ed. 523. The same principle was applied in the case of a collective bargaining agreement covering crew members of a vessel under shipping articles. *Clayton, et al., v. Standard Oil Co. of N. J.,* supra.

A collective bargaining agreement within the field in which it operates not only affects the individual employment contracts, but cannot be changed by the terms of the latter. Thus, the supplementary bonus agreements as collective bargaining agreements must not only be deemed an implied part of the shipping articles and the riders, but cannot be varied by the terms of the latter as individual contracts of hiring. In the case of *J. I. Case Co. v. N. L. R. B.,* supra, at U.S. 337, L.Ed. 767, the United States Supreme Court ruled in part as follows:

> "Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not 'limit or condition the terms of the collective agreement.' "

In an annotation to this case, reference is made to 29 U.S.C. 159(a), and the following statement is made at 88 L.Ed. 770:

> "Where representatives are designated or selected for the purposes of collective bargaining by the majority of employees, in an appropriate unit, an employer subject to the act is enjoined from entering into any contract concerning rules, rates of pay, and working conditions, except with such representatives."

See also:

Christiansen v. Local 680 of M. D. & D. Employees, supra;

Steel v. Louisville & Nashville R.R. Co., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 172;

Medo Photo Supply Co. v. N. L. R. B., 321 U.S. 678, 64 S.Ct. 830, 88 L.Ed. 1007.

It may be conceded that nearly all of the cases which deal with the principle that individual contracts of hire may not vary the terms of a collective bargaining agreement are ones in which the prohibition against such changes is applied to the employer for the protection of the employee. The United States Supreme Court, however, has also considered this question from the point of view of the employee endeavoring to obtain terms in his individual contract of hire more favorable than those granted by the collective agreement. While not holding that such a variation is impossible or that there would never be circumstances under which such a result could be reached, the United States Supreme Court has, nevertheless, cast considerable doubt on the advisability of recognizing such a procedure in the absence of most unusual circumstances. In this connection, the court, in the case of *J. I. Case Co. v. N. L. R. B.*, supra, at U.S. 338, L.Ed. 768, stated:

> "But it is urged that some employees may lose by the collective agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group and that his freedom of contract must be respected on that account. We are not called upon to say that under no circumstances can an individual enforce an agreement more advantageous than a collective agreement, but we find the mere possibility that such agreements might be made no ground for holding generally that individual contracts may survive or surmount collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. Of course, where there is a great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining. But except as so pro-

vided, advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group and always creates the suspicion of being paid at the long-range expense of the group as a whole. Such discriminations not infrequently amount to unfair labor practices. The workman is free, if he values his own bargaining position more than that of the group, to vote against representation. But the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result. We can not except individual contracts generally from the operation of collective ones because some may be more individually advantageous."

The factors involved in the present case justify the full application of the foregoing principle. Here, the supplementary bonus agreements clearly and fully operate in the field governed by the riders attached to the shipping articles. In fact, the supplementary bonus agreements cover the subject of war bonuses in greater detail and with more explicit provisions than do the riders. The war zones, in terms of voyages, are defined with particularity. The rates of war bonus are described in greater detail. In the supplementary bonus agreements with the S.U.P., M.F.O.W.W., and M.C.&S., port bonuses are prescribed for ports subject to regular bombing, although no mention of port bonuses is made in the riders. We doubt that the appellants or their counsel would disclaim the right of appellants to such port bonuses, if the *President Harrison* had called at any of these specified ports, upon the ground that the riders are the exclusive contract regulating the payment of war bonuses.

All of the supplementary bonus agreements contain machinery for adjusting war bonus to meet changing war conditions. These provisions demonstrate that such agreements did not merely prescribe minimum rates, but were the instruments by which

any future changes in rates would be fashioned. The supplementary bonus agreements with the S.U.P., M.F.O.W.W., and M.C.&S. also contain provisions prohibiting lock-outs, strikes, slow-downs, or like action in connection with and on account of war bonus issues during the effective period of the agreements. These provisions show that such pressure methods of seeking variance from the terms of the collective agreements were not only not contemplated, but expressly renounced.

The development of events relating to war bonuses prior to the consummation of the fourth series of supplementary bonus agreements also conclusively proves that these agreements were intended by all parties concerned to settle by collective agreements, once and for all, during the period of the agreements, the disturbances, sailing delays, and varying demands that had produced such chaos theretofore in the shipping industry. The story of these events is clearly portrayed in the deposition of Mr. John B. Bryan (184-293).

This background furnishes the proper perspective with which the contractual relations of the parties should be viewed. With such perspective, the conclusion is inescapable that the fourth series of supplementary bonus agreements were considered by all parties concerned as binding and final contracts on the subject of war bonuses. Bearing in mind that the supplementary bonus agreements were consummated only a few days prior to October 15, 1941, when the shipping articles were opened, or were in the process of negotiation with the licensed personnel unions at that time, one must conclude that all parties considered these agreements to prescribe conclusively the terms and conditions under which war bonuses were payable to crew members. It is unreasonable to believe that the riders attached to the shipping articles of the *President Harrison* were intended to vary from the provisions of collective bargaining agreements entered into only five or six days previously and which formed the pattern for the similar collective bargaining agreements covering licensed personnel then in the process of negotiation.

It must be concluded that the riders were intended only to carry out the terms and provisions of the supplementary bonus agreements.

We do not concede for a moment that the internment provision contained in the riders varies from that contained in the fourth series of supplementary bonus agreements. The riders, with less detail and particularity than the supplementary bonus agreements, attempted to reaffirm the internment provision contained in the collective bargaining agreements. The fact that less detail and particularity was used in the riders does not manifest a variance. It shows only an incompleteness. Should, however, it be deemed that a variance exists, we then emphatically contend, first, that, under all of the circumstances attending the transaction which this court is entitled to consider, no variance was intended, and, secondly, that, if there was a variance intended or otherwise, the same was prohibited by the collective bargaining agreements, which circumscribed the rights and responsibilities of the appellees and appellants with respect to making individual contracts of employment covering the same subject matter different in terms from those prescribed by the collective bargaining agreements.

G. It Is Clear That the Supplementary Bonus Agreements Do Not Provide for the Payment of War Bonus During Internment.

In view of the conclusion already reached by this court in *The Capillo* case that the supplementary bonus agreements do not provide for war bonus during internment of crew members on land, it is unnecessary to do more than outline the various provisions of the agreements that point to this conclusion. The supplementary bonus agreements with the S.U.P., M.F.O.W.W., and M.C.&S. at the outset indicate that war bonuses are payable only to crew members while aboard vessels in the war zones. The first "Whereas" clause contained in the preamble of these agreements reads as follows:

> "Whereas, the parties hereto are engaged in the negotiation of a collective bargaining contract relative to wages,

hours, and working conditions for members of the Union and desire to provide a collateral or supplementary agreement for bonuses payable to members of the Union *on vessels going into war zones;* and"

The last sentence of the internment provision in the supplementary bonus agreements uses the term "war zones" or "war areas." It is only while crew members are in those war zones or war areas that war bonuses are payable. We have already demonstrated how each agreement defines war risk zones or areas in terms of voyages and that, in respect to the trans-Pacific voyage here involved, the zone or area was further restricted to include only that portion of the voyage after crossing the 180th meridian westbound and until recrossing the same meridian eastbound.

This conclusion is further supported by a study of the description of other war risk zones contained in the agreements covering unlicensed personnel (Bryan's Ex. 47, 48 and 50). Reference is made in Zones I and II to "whole voyages" with an exception in Zone I if the vessel continues eastbound. Further, in Zone IV, war bonus on trans-Pacific voyages to New Zealand or Australia are, in some circumstances, made dependent upon the arrival or departure of the vessel at or from Suva. In Zone V, further reference is made to conditions relating solely to the vessel before bonus becomes payable.

Had the internment of the vessel and the crew in this case occurred while the vessel was on a voyage in War Risk Zone II, there would have been no reference to the crossing or recrossing of any meridian. War Risk Zone II is described as follows:

"Trans-Atlantic voyages to Russia (Archangel, etc.) (Whole voyage)"

Clearly, under these assumed circumstances, war bonus would be payable only while the original vessel or a vessel repatriating the crew was on such a voyage. It could not be contended that any meridian formed the boundary of any geographical area which constituted a war zone. Internment of the crew members,

for instance, in Germany certainly would not fall within a zone defined as a whole trans-Atlantic voyage to Russia.

The intent of the parties to relate the payment of war bonus directly to the voyage or position of a vessel is further manifested by the provisions dealing with port bonuses contained in the supplementary bonus agreements with the S.U.P., M.F.O.W.W., and M.C.&S. For instance, in addition to the $100 paid for calling at the Port of Suez, or any other port subject to regular bombings, an extra $5.00 was provided "for each day beyond five days that the vessel was in that port." In all of the supplementary bonus agreements, the provision requiring the maintenance of war risk insurance in the sum of $5,000 is related to voyages either "provided for in this agreement" or "described in the above danger areas."

In respect to the supplementary bonus agreements with the M.M.&P. and the M.E.B.A. (Bryan's Ex. 49 and 51), the machinery provided therein for the adjustment of war bonus rates, dependent upon future events, is geared to "war risk insurance rates paid on hulls of American flag vessels operating in all areas above described." This, of course, is a clear indication that war bonuses were payable only in relation to a vessel operating on a voyage described as a war risk area.

H. It Is Equally Clear That the Supplementary Bonus Agreements and the Riders, Taken Together, Do Not Provide for the Payment of War Bonus During Internment.

When the supplementary bonus agreements and the riders are taken together, there can be no doubt that the parties intended reference in all cases to the war zones defined with particularity in the supplementary bonus agreements.

The last sentence of the internment provision of the unlicensed riders reads:

> "War bonuses at the rate specified in paragraphs 3 and 4 hereof shall be paid while employees are in the war zones defined herein."

The corresponding sentence contained in the supplementary bonus agreements covering unlicensed personnel reads as follows:

> "War bonuses at the rate specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein."

The last sentence of the internment provision in the licensed personnel rider reads as follows:

> "War bonuses at the rate specified in paragraph 1, hereof, shall be paid while employees are in the war zones defined herein."

A similar sentence contained in the supplementary bonus agreements with the M.M.&P. and the M.E.B.A. reads as follows:

> "While employees are in the war zones or areas described herein war bonuses shall also be paid to them at the rate of 66⅔% of the said basic wages in Areas I to V, inclusive, and 25% in Area VI."

Appellants contend that paragraph 3 of the licensed personnel rider and paragraph 5 of the unlicensed personnel rider, reading as follows, define the war zones:

> "This emergency wage increase [i.e., war bonus] to apply from the crossing of the 180th meridian westbound until crossing the 180th meridian eastbound."

As we have previously shown, the last quoted provision is not a *definition* of a war risk zone or area. It is, instead, a qualification or limitation imposed on war risk zones or areas specifically described in the supplementary bonus agreements in terms of voyages.

To adopt the last quoted provision of the rider as a complete and full definition of war zones is to ignore the *specific* definition of such war zones or areas in the terms of voyages in the supplementary bonus agreements. On the other hand, in construing the supplementary bonus agreements and the riders together, the adoption of the specifically defined war risk zones

or areas in the former agreements gives effect to the general purposes of the contract and reconciles and gives meaning to the reference to the 180th meridian in both the riders and the supplementary bonus agreements. The axiom referred to by this court in *The Capillo* decision may be invoked here to give effect to the *specific* contractual language contained in the definitions of war risk zones or areas contained in the supplementary bonus agreements. This construction not only gives a reasonable meaning to all provisions of the contract, but also gives effect to the main apparent purpose.

In *Williston on Contracts,* Revised Edition, the following is stated:

> "Sec. 619. The court will if possible give effect to all parts of the instrument and an interpretation which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable; and if that is impossible an interpretation which gives effect to the main apparent purpose of the contract will be favored. Indeed, in giving effect to the general meaning of a writing particular words are sometimes wholly disregarded, or supplied, or transported."
>
> * * * * * * *
>
> "Sec. 624. It was early laid down, that, in a deed, if there be two clauses so totally repugnant to each other, that they cannot stand together, the first shall be received and the latter rejected. The same doctrine has been held in some modern cases applicable to contracts generally. * * * The *true rule* seems to be as stated in a Maine decision.
>
> * * * * * * *
>
> " 'When one intention appears in one clause in an instrument, and a different, conflicting intention appears in another clause in the same instrument, that intention should be given effect which appears in the principal or more important clause.' "
>
> *Union Water Co. v. Lewiston,* 101 Me. 564, 65 A. 67.

"Where a repugnancy is found between clauses, the one which essentially requires something to be done to effect the general purpose of the contract is entitled to greater consideration than the other. The whole agreement should, if possible, be construed so as to conform to an evident consistent purpose. Accordingly, a subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent may be disregarded."

12 *Am. Jur.* 779.

"* * * Then, again, it is a fundamental rule in the interpretation of agreements that we should ascertain the prime object and purpose of the parties, and, in case of ambiguity produced by its minor provisions, the latter should, if possible, be so construed, as not to conflict with the main purpose * * *"

Marx v. American Malting Co., 169 F. 582, 584 (6 C.C.A.).

This court, in *The Capillo* decision, has construed the applicable war zone defined in the supplementary bonus agreements as consisting of "a voyage westerly from and easterly to the 180th meridian." When these agreements are taken with the riders as constituting the contract between the parties, the same construction must be given the term "war zones" used in the riders.

"It is a familiar rule of construction that, other things being equal, words used in a certain sense in one part of an instrument are deemed to have been used in the same sense in another."

Pringle v. Wilson, 156 Cal. 313, 104 Pac. 316.

"Words used in a certain sense in one part of a contract will be deemed to have been used in the same sense in another part, unless the context indicates otherwise."

Jensen v. Franklin, 74 F.(2d) 501 (10 C.C.A.).

"It is an inveterate rule in the construction of a written instrument that ordinarily the same word occurring more

than once is to be given the same meaning, unless the context indicates that it was used in a different sense."

Midland Valley R. Co. v. Railway Express Agency, 105 F.(2d) 201 (10 C.C.A.).

As previously stated, the construction of the supplementary bonus agreements and the riders adopted by the District Court gives effect to the general purpose of the contract, does not render meaningless any specific term, but, on the contrary, gives meaning to and reconciles the paragraph in the riders referring to the 180th meridian, and consistently ascribes to the use of the term "war zones" in the riders the same sense in which this term is used in the balance of the contract, i.e., in the supplementary bonus agreements. The interpretation urged by the appellants, on the other hand, does violence to and conflicts with all these accepted rules of construction. In fact, the interpretation contended for by the appellants leads to an absurdity when applied to the case of crew members who, like the appellant Clara Main, never crossed the 180th meridian eastbound in her repatriation (539-540).

There are many additional rules of construction and maxims of jurisprudence which support the interpretation adopted by the District Court. We believe that the mere mention of these additional rules of construction and maxims of jurisprudence, without discussion, is sufficient to demonstrate their applicability to the circumstances of this case. The same are set forth in Appendix E attached hereto.

I. Reference to Other Extrinsic Evidence Overwhelmingly Proves the Parties Did Not Intend to Provide, and Did Not Provide, for the Payment of War Bonus During Internment.

We agree wholeheartedly with the ruling by this court in *The Capillo* decision that no testimony or extrinsic evidence is required to make it clear that the supplementary bonus agreements did not provide for the payment of war bonus during

internment. We also believe that we have adequately demonstrated the soundness of the District Court's conclusion that the supplementary bonus agreements and the riders attached to the shipping articles must be considered together in determining the contractual intent of the parties and that, when so considered together, the interpretation is inescapable that no provision was made for the payment of war bonus during internment. While we also believe this construction follows from merely considering the supplementary bonus agreements with the riders, it was also proper for the District Court to consider other material, extrinsic evidence in seeking clarification of the incompleteness and ambiguity contained in the riders.

The rules of evidence in admiralty courts are more liberal than those in common law courts. This has been explained in *Benedict on Admiralty,* 6th Edition, Volume 3, page 5, section 381(b) as follows:

> "Admiralty cases are tried by a single judge, without the aid of a jury. Hence the elaborate rules of evidence deemed necessary to protect the untrained jury are not required. Courts of admiralty are not bound by all the rules of evidence which are applied in courts of common law and they may, where justice requires it, take notice of matters not strictly proved and may receive in evidence testimony which might not be admissible in other courts. The experienced judge may be relied upon to appreciate the probative value of any material offered in evidence; and if he should err, the appellate court may correct the error, as an admiralty appeal is a trial de novo.
>
> "The freedom in admitting evidence is largely due to the fact admiralty cases are tried by judges, and not by juries. Thus evidence may be admitted to explain an ambiguous contract * * *"

See also:

The Vivid, 4 Ben. 419, 28 Fed. Cas. 1234, Fed. Case No. 16978 (E.D. N.Y.).

Admiralty courts are not bound by the common law rules of evidence.

Downs v. Wall, 176 Fed. 657, 659 (5 C.C.A.);
Westchester Fire Ins. Co. v. Buffalo Housewrecking & Salvage Co., 40 F.Supp. 378 (W.D. N.Y.),
Affirmed 129 F.(2d) 319 (2 C.C.A.);
The Denny, 127 F.(2d) 404 (3 C.C.A.).

An admiralty court, having to determine a controversy over a maritime contract, ambiguous in terms, is not bound within the narrow limits of a court of law. Evidence ordinarily inadmissible in a case of law might be admitted upon equitable principles in a court of admiralty, to explain an ambiguity in a maritime contract.

Mexican Petroleum Corp. of Louisiana v. North German Lloyd, 17 F.(2d) 113, (E.D. La.).

Evidence of the following types offered by the appellee and received by the District Court in this case, has been admitted by admiralty courts to aid in the interpretation of an ambiguous contract:

1. Conduct of the parties under the contract in question. (*Mexican Petroleum Corp. of La. v. North German Lloyd,* supra; *Vital v. Kerr,* 297 F. 959, 968-9 (2 C.C.A.) (Cert. den.) *Bigio v. Kerr,* 265 U.S. 592, 44 S.Ct. 637, 68 L.Ed. 1196.)

2. Previous dealings between the parties. (*Reed v. Merchant's Mutual Ins. Co.,* 95 U.S. 23, 24 L.Ed. 348; *Mexican Petroleum Corp. of La. v. North German Lloyd,* supra.)

3. Negotiations preceding the contract. (*Mexican Petroleum Corp. of La. v. North German Lloyd,* supra.)

4. Circumstances surrounding the making of the contract. (*Reed v. Merchant's Mutual Ins. Co.,* supra; *Bradley v. The Washington, Alexandria & Georgetown Packet Co.,* 13 Pet. 89, 38 U.S. 89, 10 L.Ed. 72; *Columbia, Wilson v. W. R. Grace & Company,* 4 F.(2d) 673, 675, 1925 A.M.C. 664, 667 (9 C.C.A.).)

Evidence of the type mentioned above has been admitted for the following purposes for which the aforementioned extrinsic evidence was introduced by the appellee and received by the District Court in this case:

1. The situation of the parties. (*Reed v. Merchant's Mutual Ins. Co.,* supra; *Bradley v. The Washington, Alexandria & Georgetown Packet Co.,* supra.)

2. The subject matter of the contract. (*Reed v. Merchant's Mutual Ins. Co.,* supra; *Bradley v. The Washington, Alexandria & Georgetown Packet Co.,* supra; *Newport News Shipbuilding & Dry Dock Co. v. U. S.,* 34 F. (2d) 100 (4 C.C.A.), (Cert. den.: 280 U.S. 599, 50 S.Ct. 69, 74 L.Ed. 645.)

3. The meaning of trade or technical terms. (*Bradley v. The Washington, Alexandria & Georgetown Packet Co.,* supra; *Newport News Shipbuilding & Dry Dock Co. v. U. S.,* supra.)

4. The intention of the parties. (*Reed v. Merchant's Mutual Ins. Co.,* supra; *Bradley v. The Washington, Alexandria & Georgetown Packet Co.,* supra.)

We believe that abundant reasons have already been shown why the supplementary bonus agreements and the riders must be taken together and why it must be concluded in construing these documents together that the parties did not contract for the payment of war bonus during internment. Although admissible and proper, particularly in view of the incompleteness and ambiguity contained in the riders, additional extrinsic evidence is probably unnecessary to substantiate this result. However, consideration of this additional extrinsic evidence overwhelmingly proves the contractual intent of the parties adopted by the District Court. Most of this additional extrinsic evidence is contained in the deposition of John B. Bryan (184-293), which was received in evidence (598). We shall attempt only to summarize the same here. A brief resume of this evidence was also given during the trial (449-456).

Mr. Bryan testified that, during all of the negotiations that preceded the first, second, and third series of supplementary bonus agreements, no demand was made by the unions for bonuses to the crew members in the event of internment of a vessel until the negotiations that preceded the third series of such agreements (220). At that time, the S.U.P. asked that wages be paid in the event of such internment, but this request was refused by the P.A.S.A. (220-225; Bryan's Ex. 28 and 29). In the negotiations with the M.M.&P. and M.E.B.A. preceding the nationwide, uniform agreement with these unions dated August 16, 1941, the two unions jointly demanded the payment of wages and emergency wage increases to their members until return to a continental United States port in the event of internment, destruction, or abandonment of the vessel due to war causes. They also demanded the employers agree to repatriate the licensed officers to a continental United States port and to pay them a war bonus in such connection while in the war zones. A photostatic copy of these written demands, bearing Mr. Bryan's own penciled notations made during the negotiations, was introduced in evidence (Bryan's Ex. 33). A comparison between this document and the actual agreement of August 16, 1941 (Bryan's Ex. 34) shows that all of these demands were granted except that for bonus during repatriation (242-244).

As an incident to demands for increased bonus rates, the S.U.P., thirty days later, wrote the P.A.S.A. a letter on September 16, 1941, and, among other things, demanded that "pay" continue in the event of internment of crew members (Bryan's Ex. 35 and 36). This same demand was made by the S.U.P. later that same month in a hearing before the National Defense Mediation Board (Bryan's Ex. 40). The decision of this board (Bryan's Ex. 42) on October 4, 1941, was the basis of the fourth series of supplementary bonus agreements entered into with the S.U.P., M.F.O.W.W., and M.C.&S. on October 9 and 10, 1941. A comparison between this decision and these agree-

ments will show that the recommendations contained in the decision were adopted almost verbatim in the agreements (255).

The decision, however, covered only war bonus rates, war zones where payable, and machinery for future adjustments. As shown by clause 10 thereof, other subjects were left for disposition by collective bargaining. The S.U.P. was the only Pacific Coast maritime labor union involved in the dispute before the National Defense Mediation Board (252), and the first supplementary bonus agreement was negotiated with that union on October 9, 1941 (255-256).

Thus, up to October 9, 1941, there was not even a request by the unions for bonus to be paid during internment. The M.M.& P. and M.E.B.A. had requested war bonus to be paid during repatriation while licensed officers were in war zones, but this was declined. In negotiating and drafting the first supplementary bonus agreement of the fourth series with the S.U.P., it is obvious that the internment provision contained in the August 16, 1941, agreement with the M.M.& P. and M.E. B.A. (Bryan's Ex. 34) was used as a pattern. The language is almost word for word the same. But the employers at this time conceded the payment of war bonus during repatriation while in the war zones. This was done because it was pointed out that the exposure to war risks while employed aboard a vessel on a voyage for which war bonus was paid, existed as much while the men were being repatriated on other vessels engaged on similar voyages (243-244, 257). The P.A.S.A. granted at this time (October 9, 1941) what the M.M.& P. and M.E.B.A. requested in August, 1941 (Bryan's Ex. 32).

In drafting the repatriation clause and the agreement to pay war bonus during repatriation, a punctuational change was made. The obligation to repatriate the men was set forth in the second sentence in the internment provision contained in the August 16, 1941, agreement (Bryan's Ex. 34, p. 4). The requirement that war bonus be paid during repatriation in the demands of the M.M.& P. and M.E.B.A. was in the form of a

clause added to this second sentence (Bryan's Ex. 33, p. 4). In drafting the internment provision contained in the October 9, 1941, supplementary bonus agreement with the S.U.P., the obligation to repatriate was added as a clause to the first sentence of the internment provision, and the requirement that war bonus be paid during repatriation was set forth in a second sentence (Bryan's Ex. 47, p. 5). The internment provisions contained in the supplementary bonus agreements that followed the October 9, 1941, agreement with the S.U.P. were drafted in the same fashion. The same treatment is found in the internment provision contained in the *S.S. President Harrison* riders.

We frankly assert to the court that, in our sincere opinion, this whole law suit is a result of this change in punctuation. Had the obligation to repatriate and the obligation to pay war bonus been kept together in a second sentence, the relationship between the two would have been unmistakably conclusive. It would have been so palpable that the riders as well as the supplementary bonus agreements provided for the payment of war bonus only during repatriation that no one would have conjured up the claim for war bonus during internment.

We think that the ambiguity in the riders is readily resolved by resort to the supplementary bonus agreements, which also must be treated as effective agreements binding upon the parties. But if even the slightest question remains, we are confident that the foregoing extrinsic evidence removes all shadow of doubt.

No better application could be made of one of our fundamental principles of jurisprudence that the law is more concerned with substance than with form. Thus, a non-significant change in punctuation is not permitted to defeat the intent of the parties.

Other extrinsic evidence consisted of various shipping articles with riders attached used by various shipowning members of the P.A.S.A. in respect to vessels sailing from the Port of San Francisco during 1941. We offer no reconciliation of the variance in practices among members of the P.A.S.A. in the use of

riders, especially prior to October 9, 1941. The only explanation is found in the testimony of Mr. Bryan that conditions in respect to war bonuses during this period were chaotic (211-212, 214-215, 217-218, 225-227, 238-239, 271-277; Bryan's Ex. 30, 31, 38, 39, and 41).

This confusion and chaos related to rates of war bonus and in what areas the same was payable. Provisions as to internment of the crew were of incidental importance in the minds of the parties involved. While it was contemplated at that time that American vessels might be destroyed or interned because they carried contrabands of war, since this country was not then at war, there were no instances of our crews being interned, and only the repatriation of the crew in the event of destruction or internment of the vessel was the immediate problem in this connection (239, 243-244). *Mason v. Texas Co.,* supra at 322.

Some stabilizing effect came with the uniform agreement of August 16, 1941, covering licensed officers (Bryan's Ex. 34), the decision of the National Defense Mediation Board (Bryan's Ex. 42), and, finally, with the fourth series of supplementary bonus agreements executed in October of 1941. While the various shipowning members of the P.A.S.A. continued the routine practice of using riders attached to shipping articles even after the fourth series of supplementary bonus agreements, significant changes were made in the forms of these riders. We respectfully request the court to compare the form of riders used by Matson Navigation Company and Oceanic Steamship Company (included in Ex. H) before the fourth series of supplementary bonus agreements (Appendix E) with the form of riders used by these companies on their vessels following the consummation of these agreements (Appendix F). We have already requested a similar comparison between the form of riders used by the appellee before October 9, 1941, when the first supplementary bonus agreements of the fourth series were entered into (Appendix C), and the form used thereafter (Appendix D). The changes made by the appellee, Matson and

Oceanic in their respective forms of riders after October 9, 1941, were extremely significant. They conformed the internment provision to the newly negotiated supplementary bonus agreements and added a provision for the payment of war bonus during repatriation while in the war zones.

The stabilizing influence brought about by the fourth series of supplementary bonus agreements on war bonus questions carried over beyond the time that the *President Harrison* sailed and for a month or so thereafter. However, at the time of Pearl Harbor, new bonus demands were in the making, and, shortly after this country entered the war, the Maritime War Emergency Board was created to furnish the stability and nationwide uniformity respecting war bonus that all interested parties agreed was desirable and necessary.

J. The Effect of the Decisions of the Maritime War Emergency Board.

In *The Capillo* decision, this court rejected the contention that decisions of the Maritime War Emergency Board (M.W.E.B.) were applicable and defined the rights and obligations of the parties involved in respect to war bonuses. In its decision this court assigned four reasons for refusing to apply the decisions of the M.W.E.B. (154 F.(2d) 24 at 26). The District Court, in the present case, also ruled that the decisions of the M.W.E.B. had no application chiefly for the reason that there was no showing the appellants had specifically authorized their respective unions to submit the question of the interpretation of their private contracts with shipowners to the M.W.E.B. for decision.

Since *The Capillo* decision and the decision by the District Court in the present case, there have been two other decisions by federal courts which passed on the effectiveness and applicability of decisions of the M.W.E.B. in respect to claims for war bonus during internment: *Mason v. Texas Co.,* supra, and *Montoya v. Tidewater Associated Oil Co.,* 79 F. Supp. 677

(S.D. N.Y.—1948). In both of these decisions, it was held that appropriate decisions of the M.W.E.B. were applicable and effective and that the same did not provide for the payment of war bonus during internment. It is true that in both these cases the shipping articles were opened and the voyages of the vessels were commenced after the announcement of the appropriate decision of the M.W.E.B. and that riders attached to the shipping articles were held to incorporate the decisions of the M.W.E.B. It is admitted, therefore, that there are additional reasons in these two cases for the decisions of the M.W. E.B. to be held applicable and controlling to those in the present case or in *The Capillo* case.

The appellee feels, nevertheless, that the record in these consolidated appeals presents additional evidence to that which was before this court in *The Capillo* case (76, 87-92, 96-99; Nielsen's Ex. 17) and that adequate answers are provided to three of the grounds upon which the rejection of the decisions of the Maritime War Emergency Board was based by this court in *The Capillo* case. The appellee concedes there is no evidence contained in the record in the present case concerning specific authorization by the appellants to their respective unions to join in the creation of the M.W.E.B. and to grant it the powers exercised by the Board other than evidence of their membership in such unions and the authorization that may be implied thereby and by the further fact that such unions represented appellants for collective bargaining purposes. We submit that the agreement creating and empowering the M.W.E.B., called "The Statement of Principles" (Nielsen's Ex. 1), entered into by various maritime labor unions, including those in which appellants held membership, and shipowning employers and their representatives is a type of agreement that fairly may be deemed a collective bargaining agreement (65-71). Authority to bind appellants by such agreement is as much implied by their membership in these unions as is similar authority implied by the membership of other union members whose war bonus

rights were fixed by decisions of the M.W.E.B. commencing December 7, 1941, even though they were on a voyage under shipping articles opened before that date (87-90).

To set forth our contentions fully concerning the applicability of the decisions of the M.W.E.B., particularly Decision No. 5, Revised (Nielsen's Ex. 8), would require discussion disproportionate to the importance of this proposition. Accordingly, we shall attempt only to summarize our arguments regarding the applicability of the M.W.E.B. decisions to this case:

1. The riders and supplementary bonus agreements governed the rights and obligations of the parties in respect to benefits payable to appellants because of their internment up to February 21, 1942. Decision No. 5, Revised, by its express terms, was not retroactive in the case of the *President Harrison* in these respects because of the existence of these contracts. This decision of the M.W.E.B., however, superseded the riders and supplementary bonus agreements as of February 21, 1942, and the rights and obligations of the parties thereafter were controlled by this decision in respect to benefits payable because of internment. The riders, supplementary bonus agreements, and Decision No. 5, Revised, all required the payment of basic wages and emergency wages to interned crew members until their return to a continental United States port. However, since the appellants have been paid such benefits by the appellee, the nature or origin of this obligation, already discharged by the appellee, is of no materiality.

2. On and after February 21, 1942, Decision No. 5, Revised, particularly Article 6 thereof, governed the rights and obligations of the parties as to whether war bonus was payable to the appellants during internment. This is so because this decision as of that date superseded and supplanted any existing contractual provisions governing this subject in shipping articles and collective bargaining agreements. This result, however, is of no consequence if this court agrees with the District Court and the appellee's contentions that the riders and supplementary bonus agreements do not provide for the payment of war bonus

to the appellants during internment. If, however, this court determines that the riders and supplementary bonus agreements do impose this obligation upon the appellee, then such obligation was terminated by Decision No. 5, Revised, on February 21, 1942, because that superseding decision clearly provides that war bonus is not payable to crew members during internment (Article 6).

3. The riders, supplementary bonus agreements, and Decision No. 5, Revised, all require that war bonus be paid to interned crew members following their liberation and during their repatriation to a continental United States port. However, Decision No. 2 (Nielsen's Ex. 3) and subsequent decisions covering the same subjects (Nielsen's Ex. 4, 5, 6, 7, 9, and 10) supplanted and superseded contractual arrangements contained in shipping articles or collective bargaining agreements governing the rates of war bonus and where payable on or after December 7, 1941. At the time appellants were repatriated, Decision No. 2-C (Nielsen's Ex. 9) was in effect until October 1, 1945, and Decision No. 2-D (Nielsen's Ex. 10) was in effect thereafter. Therefore, war bonus payable to appellants during repatriation, both as to rates and areas where payable, was govearned by these two decisions of the M.W.E.B. Appellee tendered and computed war bonus in accordance with these decisions for the period of repatriation, but payment was refused by appellants. The appellee concedes, as it has from the inception, that appellants are entitled to a decree for war bonus during a portion of their repatriation voyage. The District Court held that war bonus during repatriation of appellants should be computed at the rates and in the manner prescribed by the riders and supplementary bonus agreements. The appellee did not appeal from this portion of the Final Decree of the District Court and concedes that this portion of the Decree must stand even if this court agrees with appellee that Decision No. 5, Revised, governs the rights and obligations of the parties in respect to appellants' internment on and after February 21, 1942, and that the decision does not provide for war bonus during that period.

IV.

THERE IS NO MERIT IN THE CLAIM FOR MAINTENANCE DURING INTERNMENT

The finding of the District Court (597-598) in respect to the claim for maintenance is as follows:

> "Except for the obligation of the respondent contained in the articles and riders attached thereto and the aforementioned supplementary bonus agreements to pay wages during internment and until repatriation to a continental United States port and to pay war bonus during the period of a repatriation voyage until crossing the 180th meridian eastbound, the shipping articles, including the riders attached, were terminated and frustrated by the cessation and frustration of the voyage which occurred when the S.S. President Harrison was grounded and captured by the Japanese on December 8, 1941. Any obligation of the respondent to pay maintenance that might be implicit in its agreement to pay wages to crew members, no longer existed or had any application after the cessation and frustration of the voyage on December 8, 1941. There was neither an express nor an implied contract between the parties providing for the payment of maintenance to the libelants after the cessation or frustration of the voyage or after the termination or frustration of the shipping articles, including the attached riders, or during the period of internment of the libelants."

The District Court also concluded, as a matter of law (598-599), as follows:

> "The respondent is not liable to the libelants, or any of them, for the payment or furnishing of maintenance during their internment or for any period of time subsequent to December 8, 1941."

Appellants' claim for maintenance during their internment has all the appearance of an afterthought. The theory of the claim, as expressed in the libels, is vague, and, in their briefs, appellants are still not certain. They assert in both briefs that there is an implied obligation to pay maintenance as a corollary

to the agreement to pay wages during internment. In the Federer case (No. 11,946), counsel state that an inept provision in a collective bargaining agreement contains an express obligation to pay maintenance during internment although, in the discussion of the claim for war bonus, it is argued that the shipping articles with the attached riders are the exclusive contract governing the parties.

The two theories of recovery asserted by counsel in the Federer case are inconsistent. One is based on implied contract; the other on express contract. There can't be both. If there is an express agreement, there can't be an implied one.

12 *Am. Jur.* 505, Par. 7;
Phelps v. Sheldon, 13 Pick. 50 (Mass.), 23 Am. Dec. 659;
Hawkins v. United States, 96 U.S. 689, 24 L.Ed. 607.

Since counsel in the Agnew and Griffin cases (Nos. 11,943 and 11,944) don't advance the express contract theory, although the S.U.P., M.F.O.W.W., M.M.&P., and M.E.B.A. basic agreements contained a similar provision, and since counsel in the Federer case really only suggest their might be such a theory, it is, perhaps, in order to dispose of this first.

Counsel in the Federer case quote a provision contained in the basic agreement with the M.C.&S. of July 5, 1940 (Ex. 6A). In the first place, this basic agreement was superseded by a new basic agreement with the M.C.&S. dated October 31, 1941, and effective October 1, 1941 (Bryan's Ex. 57). The same provision, however, was in the latter agreement (see page 23 thereof).

As counsel concede (Brief, p. 22), no party to the agreement ever intended the provision to apply to a case of internment. Similar provisions have been in basic agreements between the P.A.S.A. and these various unions since 1937, long before war conditions were contemplated (204). No dispute has ever arisen and no claim was ever made relating to the application of these provisions to internment of crew members (208-209), although similar agreements with the same provisions were in effect dur-

ing the war and while the merchant marine was operated by the War Shipping Administration (Bryan's Ex. 8, 9, and 10; 204-207), and although, as the court can judicially notice, hundreds of our merchant seamen were interned during the war. Thus, as a matter of practical construction by the parties, no one until now has even attempted to apply the provision to a situation of internment during war.

The comparable provision in the applicable basic agreement with the S.U.P. dated November 4, 1941, and effective October 1, 1941 (Bryan's Ex. 55), reads as follows at page 22:

> "Section 6. When board is not furnished the crew shall receive 75 cents for dinner and 75 cents for supper and when compelled to sleep on shore on account of repairing, cleaning or fumigating the sleeping quarters, they shall receive one dollar and fifty cents ($1.50) per night for rent."

Similar provisions are in other applicable basic agreements (Bryan's Ex. 56 and Ex. 5, at page 9; Bryan's Ex. 58, at page 11; Bryan's Ex. 6 and 59, at page 15 of the former; Bryan's Ex. 60 at page 5).

It is obvious that all of these provisions were designed, intended, and construed by the parties to apply only to a situation where the voyage was in progress and not frustrated; where the crew members continued in the service of the ship and in the employ of the shipowner; and where there was only a temporary interruption in the furnishing of meals and sleeping quarters aboard the vessel and not a permanent impossibility of doing so.

With respect to the contention that there was an implied obligation to furnish maintenance, it should be noted at the outset that, at least, counsel in the Federer case (Brief, p. 19) concede the law to be that when a voyage is frustrated or abandoned, as where a vessel is captured or interned, the shipping articles are dissolved and no further obligation to the seamen from the shipowner exists.

See:

U.S.C., Title 46, Sec. 593;
The Saratoga, Fed. Cas. No. 12,355;
The Edna, 291 F. 379 (N.D. Cal.);
The Edna, 292 F. 640 (N.D. Cal.);
Alaska S.S. Co. v. United States, 290 U.S. 256, 54 S.Ct. 159, 78 L.Ed. 302;
American Mail Line v. United States, 59 F.Supp. 921;
Horlock v. Beal (1916), A.C. 486.

It is clear, therefore, that without the riders attached to the shipping articles or the supplementary bonus agreements or Decision No. 5, Revised, of the M.W.E.B., no further obligations were owed the appellants by the appellee following the internment of the *President Harrison.* It is at this point, however, that all counsel for the appellants leave firm ground.

Counsel argue that appellee's obligation to pay wages until the crew were returned to a continental United States port under the riders (and, we add, the supplementary bonus agreements and Decision No. 5, Revised, of the M.W.E.B.), in the event of the vessel's internment, created an implied corollary obligation to furnish maintenance or subsistence for the same period. As authority for this unique proposition, counsel cite various decisions holding that, as an incident to the hiring or employment of seamen, there is an implied obligation on the part of the shipowner to furnish food and lodging. They then assert the judicially unsupported proposition that as long as the shipowner is under contract to pay wages an implied obligation exists on his part to furnish maintenance.

All of the cases cited by counsel, as conceded in the Federer brief (p. 21), involve situations where the ship was in commission; the voyage was actually in progress or, at least, had not been terminated or frustrated; the shipping articles had not been frustrated or dissolved; the seamen were still in the service of the ship; the employer-employee relationship still existed in

fact and in theory; wages were payable for services rendered; and neither the ship nor crew had been interned so as to render all obligations impossible of performance.

There can be no doubt that the capture and internment of the *President Harrison* and the appellants terminated their service.

> "The services of libelants terminated on January 27, 1916, by reason of the loss of the vessel to her owners, due to her capture by the British as a prize. Libelants thereafter performed no service * * *"
>
> *The Edna,* 291 F. 379 at 380 (N.D. Cal.).

The obligation of the appellee to pay benefits to the appellants in the event of internment of the vessel was measured by wages, but the benefits paid for the period of internment and repatriation were not compensation for services rendered. The articles were not kept alive after the internment simply because a rider attached thereto made provision as to what would be done after the articles were frustrated and the services of the crew terminated. The wages paid the appellants for the period of internment and repatriation were not "earned" wages and were not paid before the United States Shipping Commissioner, and shown on payoff articles as were the wages earned up to December 8, 1941.

The English courts have denied a claim for subsistence predicated on contentions similar to those advanced by appellants. *The Croxteth Hall* and *The Celtic,* 143 L.T.Rep. 316 (1930), P. 179, 18 Asp. Mar. L. 121 (Affirmed by the House of Lords, 18 Asp. Mar. L. 184), were tried together and involved the construction of an English statute reading as follows:

> "Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreements, he shall * * * be entitled in respect of each day on which he is in fact unemployed during a period of two months from the date of termination of such service, to receive wages at the rate to which he was entitled on that date."

It will be noted that in the cited cases there was a statutory requirement to pay wages after the termination of services comparable to the contractual requirement in the present case. In the cited cases, the libelants also claimed subsistence in addition to two months' wages allowed under the statute, because their ships were wrecked before the voyages were ended. In denying their claim for subsistence, the court, at Asp. Mar. L. 123, held as follows:

> "The claim for subsistence allowance in addition to wages, on the ground that the seamen's remuneration under the articles included his 'keep' was not seriously pressed, and, in my opinion, could not be sustained. The language of the section excludes the claim. The crew are to serve on board, and, in consideration of their service, as the articles state 'the master * * * agrees to pay to the * * * crew as wages the sums against their names respectively expressed and to provide them with provisions according to the scale.' 'Wages' at the rate to which the seaman was entitled under the articles is what the section, within restricted limits, entitled him to receive during a possible two months of unavoidable unemployment."

The circumstances presented in the present case do not permit the implication of an obligation to furnish subsistence under American authorities.

In *Cousins Inv. Co. v. Hastings Clothing Co.,* 45 Cal. App. (2d) 114, 113 P.(2d) 878, the court, in denying the existence of an implied obligation, held as follows:

At page 879:

> "It may be stated generally that implied covenants are not favored in the law."

At page 882:

> "* * * The rules * * * controlling the exercise of judicial authority to insert implied covenants may be stated as follows: (1) The implication must arise from the language used or it must be indispensible to effectuate the intention of the parties. (2) It must appear from the language used

that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it. (3) Implied covenants can only be justified on the grounds of legal necessity. (4) A promise can be implied only where it can be rightly assumed that it would have been made if attention had been called to it. (5) There can be no implied covenant where the subject is completely covered by contract."

It is clear that the implied obligation claimed by the appellants does not arise from any language used, nor is it indispensable to effectuate the intent of the parties. It certainly was not so clearly within their contemplation it was deemed unnecessary to express it. The claimed implication is not a legal necessity, and there is no justification for an assumption the promise to furnish subsistence would have been made if attention were called to it. The subject of subsistence and provisions during the voyage was actually covered by the articles as required by statute (46 *U.S.C.* 564). While in October, 1941, the internment of American vessels was a contemplated possibility, it was the duty of all warring nations to repatriate seamen of neutral countries, and there was no reason to contemplate the internment of such crew members. *Mason v. Texas Co.,* supra at 322. Under other federal statutes, crew members of vessels lost, destroyed, or interned due to war causes are considered destitute seamen, and it also is the duty of the federal government to provide and care for them. (46 *U.S.C.* 593, 678; *American Mail Line v. United States,* supra; *The Edna,* supra). Even if internment of the *President Harrison* crew were reasonably contemplated, it would be anticipated the very circumstances of internment would make impossible the furnishing of maintenance by the appellee. Moreover, it would be expected at this stage of the war that the interning government would furnish quarters and food to internees in accordance with humane concepts and international law. Accordingly, there is no basis for assuming the appellee would voluntarily accept a needless obligation impossible of performance.

"Where parties * * * have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications. The presumption is that, having expressed same, they have expressed all of the conditions by which they intend to be bound under the instrument."

Maryland v. Baltimore & Ohio R.R., 22 Wall. 105, 89 U.S. 105, 22 L.Ed. 713 at 714.

"Where parties have entered into written engagements which industriously express the obligations which each is entitled to assume, the courts should be reluctant to enlarge them by implication as to important matters. The presumption is that, having expressed some, they have expressed all of the conditions by which they intend to be bound."

Arthur v. Baron de Hirsch Fund, 121 F. 791 (2 C.C.A.).

There is no reported instance of anyone else having the ingenuity or temerity of counsel in advancing the contention a shipowner is obligated to furnish maintenance to a seaman during his internment by the enemy. Such contentions are equally applicable to the hundreds of American merchant seamen interned during World War II who, like appellants, received benefits measured by wages for the period of their internment. The obvious reason such contentions have not been advanced, much less sustained, is that they have no merit.

V.

CONCLUSION

In conclusion, we summarize the appellee's contentions as follows:

In respect to the claim for war bonus during the period of internment, the rights and obligations of the parties are not defined by the riders alone, which are incomplete and ambiguous. Resort must be had to the supplementary bonus agreements to ascertain the contractual intent of the parties. These collective bargaining agreements are also operative by their own express terms and must be given effect as valid, enforceable contracts binding the parties. The supplementary bonus agreements and the riders are part of the same transaction and must be taken and interpreted together as a matter of construction. Moreover, by virtue of sound legal principle, as well as established practice of the parties, these collective bargaining agreements must be treated as implied parts of the shipping articles and the attached riders, and the latter, as individual contracts of hire, do not, and cannot, vary in terms from the collective bargaining agreements covering the same subject matter.

The supplementary bonus agreements do not provide for the payment of war bonus during the period of internment as held by this court in *The Capillo* case and by the District Court in the present case. The soundness of this construction is apparent from an analysis of the agreements. The same conclusion must be reached in construing the riders and the supplementary bonus agreements together. Extrinsic evidence of related events, prior and contemporaneous, is admissible for the numerous reasons stated, and overwhelmingly proves the parties did not intend to, and did not, provide for the payment of war bonus during the period of internment.

Decision No. 5, Revised, of the M.W.E.B., providing for the same payment of wages during internment as the supplementary bonus agreements and the riders, also, by express terms, effective February 21, 1942, did not provide for war bonus during intern-

ment. As of the date mentioned, the parties were contractually bound by the decisions of the M.W.E.B., but since the same result is reached by the District Court's decision on other grounds, the effect of the decisions of the M.W.E.B. is of no consequence or materiality if the findings and conclusions of the District Court are upheld.

The incidental claim for maintenance during internment cannot be supported under the theory of express promise or the theory of implied promise. There is no precedent in practice or law for the payment of subsistence, or an allowance therefor, during internment. The lack of any merit in this claim is demonstrated by American and English authorities cited and by the absence of any reported instance of such a claim being sustained, or even advanced.

The appellants are entitled to war bonus during their repatriation computed at the rates and in the manner prescribed by the supplementary bonus agreements and the riders attached to the shipping articles, as found by the District Court. The recovery by appellants of this allowance, in addition to the substantial benefits already paid them, marks the limit of appellee's liability to appellants.

Respectfully submitted,

LILLICK, GEARY, OLSON,
ADAMS & CHARLES
IRA S. LILLICK
JAMES L. ADAMS
Proctors for Appellee

(Appendices follow)

Appendices

APPENDIX A

Rider for Passenger and Freight Vessels in the Trans-Pacific and Straits Settlements Service

war bonus*

1. The American President Lines agrees to pay an ~~emergency wage increase~~ of 60% of their basic wages to the licensed crew of the *S.S. President Harrison,* Voyage 55.

2. The monthly basic wages as shown in the following agreements between the Pacific American Shipowners Association and the Unions are to be used as the basis for payment of this increase:

Masters, Mates and Pilots	Effective December 30, 1939
Marine Engineers Beneficial Assn.	" May 1, 1940
American Communications Association	" July 13, 1940, and as amended by arbitration award of May 3, 1941.

war bonus*

3. This ~~emergency wage increase~~ to apply from the crossing of the 180th meridian westbound until crossing the 180th meridian eastbound.

4. In the event the vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the Pacific American Shipowners Association and the Unions shown above shall be paid to the date the members of the crew arrive in a Continental United States port, and the employees shall be repatriated to a Continental United States port. War bonuses

*It was stipulated at the trial that the term "emergency wage increase" used in the rider was intended by the parties to mean "war bonus" (588-589), and this latter term has been substituted herein for purposes of clarification.

at the rates specified in paragraph 1, hereof, shall be paid while employees are in the war zones defined herein.

5. In the event of loss of personal effects by any number of the Licensed Crew, due to necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, the Company agrees to reimburse each licensed man so affected by an amount not in excess of $500.00.

6. War risk insurance in the sum of $5,000 shall be furnished to licensed members of the crew on this voyage in accordance with agreements.

AMERICAN PRESIDENT LINES, LTD.

R. A. FREDIANI (Sgd.)
Deputy U. S. Shipping Commissioner
(SEAL)

APPENDIX B

Rider for Passenger and Freight Vessels in the Trans-Pacific and Straits Settlements Service

war bonus*.

1. The American President Lines agrees to pay an ~~emergency wage increase~~ to the unlicensed crew of the *S.S. President Harrison,* Voyage 55, as follows:

2. The monthly basic wages as shown in the following agreements between the Pacific American Shipowners Association and the Unions are to be used as the basis for payment of this increase:

Sailors' Union of the Pacific	Effective October 10, 1939
Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers' Association—	" October 1, 1941
Marine Cooks and Stewards' Assn of the Pacific Coast—	" July 5, 1940

3. To all employees entitled to receive basic wages of $120.00 per month or less under said Agreement, the sum of $80.00 per month.
4. To all employees entitled to receive in excess of $120.00 per month under said agreement, 66⅔% of such basic monthly wage.

war bonus* .

5. This ~~emergency wage increase~~ to apply from the crossing of the 180th meridian westbound until crossing the 180th meridian eastbound.

6. In the event the vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the Pacific Ameri-

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*It was stipulated at the trial that the term "emergency wage increase" used in the rider was intended by the parties to mean "war bonus" (588-589), and this latter term has been substituted herein for purposes of clarification.

can Shipowners Association and the Unions shown above shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in paragraphs 3 and 4 hereof shall be paid while employees are in the war zones defined herein.

7. In the event of loss of personal effects by any member of the unlicensed crew, due to necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, the Company agrees to reimburse each unlicensed man so affected by an amount not in excess of $150.00.

8. War risk insurance in the sum of $5,000 shall be furnished to members of the crews on this voyage.

AMERICAN PRESIDENT LINES, LTD.

R. A. FREDIANI (Sgd.)
Deputy U. S. Shipping Commissioner
(SEAL)

APPENDIX C

Internment provision contained in rider used by American President Lines prior to October 9, 1941:

> "In the event the vessel be interned and for that reason be unable to continue her voyage, the company agrees to pay wages including emergency wage increase, to the dates members of the crew arrive in a continental United States port; furthermore the company agrees, in such event, to arrange for repatriation of such men to a continental United States port."

Vessel	Date (1941)
Pres. Taylor	1-3
" Cleveland	1-18
" Coolidge	1-22
" Madison	1-31
" Pierce	2-5
" Johnson	2-17
" Taft	2-19
" Grant	2-28
" Cleveland	3-5
" Jackson	3-5
" Coolidge	3-19
" Harrison	3-19
" Fillmore	3-19
" Pierce	4-4
" Hayes	4-9
" Tyler	4-17
" Taft	4-18
" Garfield	4-23

Vessel	Date (1941)
Pres. Taylor	5-1
" Cleveland	5-6
" Monroe	5-17
" Coolidge	5-19
" Madison	5-29
" Pierce	6-4
" Fillmore	6-13
" Grant	7-7
" Coolidge	7-7
" Harrison	7-21
" Garfield	8-11
" Monroe	8-28
" Coolidge	9-5
" Taylor	9-8
Perida	9-24
Pres. Madison	10-3
" Van Buren	10-9*

*This vessel, opening articles October 9, 1941, employed the above form of rider with an additional rider stating that, "The agreement of October 9 between the Sailors' Union of the Pacific and Pacific American Shipowners Association relative to war bonuses shall apply to this voyage."

APPENDIX D

Internment provision contained in rider for unlicensed personnel used by American President Lines after October 9, 1941:

> "In the event the vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic voyages and emergency wages specified in the collective bargaining agreement between the Pacific American Shipowners Association and the unions shown above shall be paid to the date the members of the crew arrive in a continental United States port and the employees shall be repatriated to a continental United States port. War bonuses at the rate specified in paragraphs 3 and 4 hereof shall be paid while employees are in the war zones defined herein."

Vessel	Date (1941)	Vessel	Date (1941)
Pres. Buchanan	10-11	Pres. Grant	11-7
Ruth Alexander	10-21	" Johnson	12-3
Chant	10-22	" Garfield	12-4
Pres. Coolidge	10-30	" Polk	12-5
Day Star	11-3	Penant	12-23

APPENDIX E

Internment provision contained in rider used by Matson Navigation Company and Oceanic Steamship Co. prior to October 9, 1941:

> "In the event the vessel be interned, and for that reason, be unable to continue her voyage, the company agrees to pay wages, including additional emergency wages, to the date members of the crew arrive in a United States port; furthermore, the company agrees, in such event, to arrange for repatriation of such men to a United States port."

Vessel	Date (1941)
Monterey	1-6
Maui	1-4
Mariposa	2-1
Monterey	3-1
Maui	3-28
Mariposa	4-1
Liloa	4-4
Monterey	4-26
Mariposa	5-22
Monterey	6-21
Hawaiian Shipper	6-30
Exporter	7-18
Hawaiian Merchant	7-25
Manini	8-15
Monterey	8-16
Mariposa	9-17
Mapele	10-6

APPENDIX F

Internment provision contained in rider used by Matson Navigation Company and Oceanic Steamship Co. after October 9, 1941:

> "In the event the vessel be interned, destroyed or abandoned as a result of war operations and unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreements between the parties shall be paid to the date members of the crew arrive in continental United States ports and the employees shall be repatriated to a continental United States port. War risk bonuses at the rate specified in subdivision (b) of paragraph 1 of the supplementary agreements between the parties shall be paid while employees are in the war zones defined therein."

For licensed personnel, the last sentence of the provision reads as follows:

> "While the employees are in the war zone areas described in the supplementary agreements covering war risk bonuses payable to Licensed Officers, war risk bonuses shall also be paid to them at the rate of 66⅔% of said basic wages in areas I to V inclusive, and 25% in area VI."

Vessel	Date (1941)	Vessel	Date (1941)
Hawaiian Merchant	10-15	Malama	11-26
Mariposa	11-12	Manini	11-27
Hawaiian Planter	11-19	Monterey	12-4
Maunaloa	11-19	Matsonia	12-5

APPENDIX G

Rules of Construction

"The whole of a contract is to be taken together, so as to give effect to every part of it, if reasonably practical, each clause helping the other."

C.C.C., Section 1641.

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect if it can be done without violating the intention of the parties."

C.C.C., Section 1643.

"The words of a contract are to be understood in their ordinary and proper sense, rather than according to the strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

C.C.C., Section 1644.

"Technical words are to be interpreted as usually understood by persons in the professional business to which they relate, unless clearly used in a different sense."

C.C.C., Section 1645.

"However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intend to contract."

C.C.C., Section 1648.

"Particular clauses of a contract are subordinate to its general intent."

C.C.C., Section 1650.

"Repugnancy in a contract must be reconciled if possible by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract."

C.C.C., Section 1652.

"Words in a contract which are wholly inconsistent with its nature or with the main intention of the parties are to be rejected."

C.C.C., Section 1653.

"Stipulations which are necessary to make a contract reasonable or conformable to usage are implied in respect to matters concerning which the contract manifests no contrary intention."

C.C.C., Section 1655.

Maxims of Jurisprudence

"Where the reason is the same, the rule should be the same."

C.C.C., Section 3511.

"He who can and does not forbid that which is done on his behalf is deemed to have bidden it."

C.C.C., Section 3519.

"He who take the benefit must bear the burden."

C.C.C., Section 3521.

"Contemporaneous exposition is in general the best."

C.C.C., Section 3535.

"An interpretation which gives it effect is preferred to one which makes void."

C.C.C., Section 3541.

"Interpretation must be reasonable."

C.C.C., Section 3542.